Supreme Court, U.S.
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No. 09-392 SEP 29 2009

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In The

Supreme Court of the United States

VIRGIL MORAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Federal Rule of Criminal Procedure 32(i)(1)(C)'s requirement that a defendant be permitted to comment on "matters relating to an appropriate sentence" entitles a defendant to notice prior to the pronouncement of sentence that sex offender special conditions of supervised release are contemplated, where the special conditions are not among the statutory mandatory or discretionary conditions of supervised release and there is no nexus between the special conditions and the offense of conviction?

II. Whether 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3's requirement of a reasonable relationship between special conditions of supervised release and a defendant's offense of conviction, history, and characteristics and the statutory purposes of sentencing is satisfied when sex offender special conditions are imposed based on a single sex offense in the remote past even though there is no evidence the defendant presently has a propensity to commit sex offenses?

III. Whether, for purposes of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3's requirement that special conditions of supervised release not involve a greater deprivation of liberty than reasonably necessary to achieve the statutory purposes of sentencing, a special condition of supervised release prohibiting internet access without the permission of the probation officer is an undue deprivation of liberty when there is no connection between computers or the internet and the offense of conviction or any prior alleged wrongdoing?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

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Petitioner Virgil Moran respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-17) is reported at 573 F.3d 1132 (11th Cir. 2009). The Judgment of the district court (App. 18-30) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on July 1, 2009. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Federal Rule of Criminal Procedure 32(i)(1)(C) requires that at sentencing, the district court "must allow the parties' attorneys to comment on the probation officer's determinations *and other matters relating to an appropriate sentence.*" (Emphasis added).

In pertinent part, 18 U.S.C. Section 3583(d) provides:

> The court may order, as a further condition of supervised release, to the extent that such condition–
>
> (1) is reasonably related to the factors set forth in [18 U.S.C.] section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
>
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);
>
> any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate.

The subsections of Section 3553(a) referred to are the following:

> The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> . . .

United States Sentencing Guideline Section 5D1.3 provides as follows:

> (b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any

pertinent policy statements issued by the Sentencing Commission.

STATEMENT OF THE CASE

I. Background

The United States District Court for the Middle District of Florida had jurisdiction of this matter pursuant to 18 U.S.C. Section 3231.

In the district court, Mr. Moran pled guilty to a charge of being a felon in possession of a firearm. App. 18. Mr. Moran was sentenced on the firearm charge in April 2007. App. 3. Over thirteen years earlier, in March 1994, Mr. Moran was charged in Florida state court with committing a lewd and lascivious act on a child under sixteen based on an incident that allegedly took place in 1993. Pre-Sentence Investigation Report (PSR) ¶ 33. Although he pled no contest to the 1994 charge, Mr. Moran stated in his response to the PSR that he was offered a sentence of time served followed by probation in return for his plea. PSR ¶ 33. Mr. Moran was required as a condition of his probation to attend sex offender counseling. PSR ¶ 33.

Mr. Moran had never been convicted of a sex offense prior to the 1994 case and has not been convicted of another sex offense since 1994. PSR ¶¶ 29-32, 34-37. While he was charged with sex offenses on several occasions, in all but one of those cases the charges were dropped, and in the remaining case

Mr. Moran pled no contest to a simple assault charge and was sentenced to time served. App. 3-4; PSR ¶¶ 34, 45, 46, 48. None of the five times Mr. Moran was sentenced on new charges or supervision violations following the 1994 conviction resulted in Mr. Moran being subjected to sex offender sanctions. PSR ¶¶ 33-37.

Mr. Moran objected to the allegations relating to sex offenses in the PSR. App. 4. He denied that the alleged acts had taken place and asserted that the allegations had been concocted by his sister-in-law. App. 4. The government presented no evidence at sentencing to establish that Mr. Moran had committed any new sex offense since 1994, that Mr. Moran presently has a propensity to commit sex offenses, or that Mr. Moran is in need of sex offender mental health treatment or any other sex offender special conditions to further the statutory purposes of sentencing.

II. Sex offender special conditions are imposed on Mr. Moran at his sentencing for being a felon in possession of a firearm without notice.

The first mention of sex offender special conditions of supervised release came when the district court pronounced sentence and imposed a number of special conditions. App. 5-6. Among other things, these special conditions require that Mr. Moran:

(1) participate in a mental health program specializing in sex offender treatment;

(2) register as a sex offender;

(3) refrain from having any contact with minors without written approval of the probation officer and refrain from entering into any area in which children frequently congregate;

(4) not possess any video, magazines, or literature depicting children in the nude or in sexually explicit positions;

(5) not possess or use a computer with access to the Internet without written approval from the probation officer, and permit routine inspection of his computer, hard drive, and other media storage materials;

(6) submit to search of his person, residence, place of business, storage units, computer, or vehicle, by the probation officer, based on reasonable suspicion.

App. 24-25.

Following pronouncement of the sentence, the district court asked whether there were any objections to the sentence. App. 6. Although the district court had already ruled, Mr. Moran's counsel stated that he had a "generalized objection" because he was not "prepared to respond to" the sex-offender conditions of supervised release. App. 6. Mr. Moran's counsel advised the court that he had not "previously

been apprised" that sex offender conditions would be imposed and hadn't "specifically examined the statutes" relevant to the imposition of such conditions. App. 6.

Mr. Moran's counsel pointed out that Mr. Moran's only sex offense conviction took place in 1994, and that as a result of that offense, Mr. Moran received sex offender treatment in the Florida state system. Doc. 75 at 81. He explained that sex offender conditions had never been imposed on Mr. Moran in any case after the 1994 conviction. Doc. 75 at 81-82. Mr. Moran's counsel argued that based on the long period of time that had passed since that offense, imposing sex offender conditions would subject Mr. Moran to unnecessary conditions of supervised release. App. 6-7.

Mr. Moran's counsel stated that the sex offense allegations against Mr. Moran were "false" and "unsubstantiated to the point that" Mr. Moran was not prosecuted. App. 6. Mr. Moran's counsel additionally proffered that all of the allegations of sexual misconduct against Mr. Moran, including the allegation that led to his single sex offense conviction, originated with Mr. Moran's sister-in-law. Doc. 75 at 82. According to Mr. Moran, the sister-in-law responsible for those allegations was a crack cocaine addict who later died of an overdose and fabricated the allegations because she wished to hurt him. Doc. 75 at 82; PSR ¶¶ 34, 45-48.

The district court overruled Mr. Moran's objections to sex offender special conditions. App. 7.

III. The Court of Appeals' decision

Mr. Moran argued on appeal that reversal was required for two reasons: (1) the district court failed to provide him notice that it intended to impose special conditions of supervised release; and (2) the special conditions the district court imposed were not reasonably related to the nature and circumstances of Mr. Moran's conviction, Mr. Moran's history and characteristics, or the statutory purposes of sentencing and the special conditions unnecessarily infringed on his liberty. The court of appeals affirmed. App. 2.

The court of appeals ruled that Mr. Moran was not entitled to notice that the district court intended to impose special conditions of supervised release. It recognized that several "circuits have required notice before the imposition of sex offender special conditions." App. 9 (citing *United States v. Atencio*, 476 F.3d 1099, 1108 (10th Cir. 2007), *overruled on other grounds*, *Irizarry v. United Staies*, 128 S. Ct. 2198, 2201 n.1 (2008); *United States v. Wise*, 391 F.3d 1027, 1032-34 (9th Cir. 2004); *United States v. Angle*, 234 F.3d 326, 346-47 (7th Cir. 2007); *United States v. Coenen*, 135 F.3d 938, 941-43 (5th Cir. 1998)). The court of appeals stated, however, that these decisions were based on the due process concerns that led the Court to rule in *Burns v. United States*, 501 U.S. 129 (1991), that notice must be provided before an

upward departure from the United States Sentencing Guidelines. App. 9. The court of appeals held that the Court's ruling in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), that *Burns*' notice requirement does not apply to a variance from the sentencing guidelines should be extended to special conditions of supervised release. App. 10.

The court of appeals also affirmed the special conditions the district court imposed on Mr. Moran. App. 17. The court of appeals stated that the special conditions relate to Mr. Moran's criminal history and promote the interests of rehabilitation and protecting the public. App. 13, 15, 16.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's decision that notice is not required prior to the imposition of special conditions of supervised release creates a circuit conflict on an important matter and will result in defendants being denied an opportunity to comment on a matter relating to an appropriate sentence.

Certiorari should be granted because the Eleventh Circuit's holding that defendants need not be afforded notice prior to the imposition of sex offender special conditions of supervised release conflicts with decisions of other circuit courts of appeals "on the same important matter." Sup. Ct. R.

10(a). The Eleventh Circuit recognized that its decision was in conflict with decisions of other circuit courts requiring notice prior to the imposition of sex offender special conditions, but held that the rule stated in *Irizzary v. United States*, 128 S. Ct. 2198 (2008), that notice is not required prior to the imposition of a sentence that is a variance from the Sentencing Guidelines, should be extended to special conditions of supervised release. The new rule announced by the Eleventh Circuit is not required by *Irizzary* and will result in defendants being denied an opportunity to comment on an important matter related to sentencing. Further review is therefore warranted.

A. The Eleventh Circuit's decision conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits.

The Eleventh Circuit's ruling that notice is not required prior to the imposition of sex offender special conditions of supervised release conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits in *United States v. Coenen*, 135 F.3d 938 (5th Cir. 1998); *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000); *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003); *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008); *United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004); *United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007), *overruled on other grounds*, *Irizarry*, 128 S. Ct. at 2201 n.1; *United States v. Bruce*, 458 F.3d 1157 (10th Cir. 2006); and *United States v. Bartsma*,

198 F.3d 1191 (10th Cir. 1999), *overruled on other grounds*, *Atencio*, 476 F.3d at 1105 n.6. Evaluating the conflicting opinions of the circuit courts of appeals requires a discussion of Federal Rule of Criminal Procedure 32 and the Court's opinions in *Burns v. United States*, 501 U.S. 129 (1991), and *Irizzary*.

1. Rule 32, *Burns*, and *Irizzary*

Rule 32(i)(1)(C) requires that district courts allow the parties to comment on "matters relating to an appropriate sentence." The Court stated in *Burns* that this rule "contemplates full adversary testing of the issues relevant to a Guidelines sentence." 501 U.S. at 135. For that reason, the Court held in *Burns* that a defendant is entitled to notice before a district court *sua sponte* departs from the applicable United States Sentencing Guidelines range. 501 U.S. at 135. The Court stated, "Obviously, whether a *sua sponte* departure from the Guidelines would be legally and factually warranted is a 'matter relating to the appropriate sentence.'" *Id.* at 135. It found that implicit in "the right *to comment* on the appropriateness of a *sua sponte* departure" is "the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-36.

The Court stated in *Burns* that a rule allowing *sua sponte* departure from the Guidelines in the absence of notice would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing

Guidelines sentences." 501 U.S. at 137. Under such a rule:

> At best . . . parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

Id. Accordingly, the Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.* at 138. The Court further noted that if it were "to read Rule 32 to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.*

Rule 32 was amended in the 2002 amendment cycle to reflect *Burns*' holding. *See* Rule 32, Advisory Committee Notes, 2002 Amendment. As a result, Rule 32(h) now provides that before a district court may "depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."

Following the Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines are advisory, not mandatory, the Court addressed in *Irizzary* whether the notice requirement established in *Burns* and Rule 32(h) applies when the sentence imposed is a "variance," as opposed to a "departure" from the applicable Sentencing Guidelines range. 128 S. Ct. at 2200. The rationale of *Irizzary*'s holding that defendants are not entitled to notice of a potential variance was threefold. First, the Court held that because defendants are no longer entitled to expect a within-Guidelines sentence following *Booker*, due process does not require notice before a variance is applied. 128 S. Ct. at 2202. As the Court noted, although the Guidelines "continue to play a role in the sentencing determination" post-*Booker*, "there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Id.* at 2202-03 (citation omitted). Second, the Court stated, providing notice often

"would not affect the parties' presentation of argument and evidence." *Id.* at 2203. Third, the Court expressed confidence that "Rule 32's other procedural protections" would ensure that "all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id.* at 2203-04.

2. The Fifth, Seventh, Ninth, and Tenth Circuit opinions

Prior to the Court's opinion in *Irizzary*, cases in the Fifth, Seventh, Ninth, and Tenth Circuits held that notice is required prior to the imposition of sex offender special conditions of supervised release. Although the cases addressing the notice issue vary somewhat in the manner in which they frame the notice rule, the essence of their holdings is that a defendant is entitled to notice of a special condition unless the defendant should reasonably have anticipated the condition. Notice has accordingly been required where the special condition imposed was not among the statutory mandatory and discretionary special conditions, the condition was unexpected, or the condition was not related to the offense of conviction. Under any of these permutations of the notice rule, Mr. Moran was entitled to notice before sex offender special conditions were imposed on him in this case.

The Fifth, Seventh, and Ninth Circuits have held that notice is required prior to the imposition of a

special condition that is not among the mandatory or discretionary statutory conditions of supervised release identified in 18 U.S.C. Section 3563 or United States Sentencing Guideline 5D1.3. *Coenen*, 135 F.3d at 943; *Wise*, 391 F.3d at 1033; *Cope*, 527 F.3d at 953. The Fifth Circuit stated in *Coenen* that a defendant was entitled "under Rule 32 and *Burns*" to notice prior to the imposition of a sex offender special condition that was "not expressly contemplated by the Guidelines," stating that such notice would "serve to greatly further Rule 32's 'purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences.'" 135 F.3d at 943 (quoting *Burns*, 501 U.S. at 137). The Seventh Circuit stated in *Angle* that it agreed with the Fifth Circuit's decision in *Coenen* and held that the defendant in that case was entitled to notice prior to the imposition of a sex offender registration condition that was not listed among the mandatory or discretionary statutory conditions of supervised release. 234 F.3d at 347. Similarly, the Ninth Circuit held that "[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness." *Wise*, 391 F.3d at 1033; *see also Cope*, 527 F.3d at 953.

The Seventh Circuit stated the rule slightly differently in *Scott*, where it held that defendants are entitled under Rule 32 to notice "of terms that are out

of the ordinary, and thus unexpected." 316 F.3d at 736. Accordingly, *Scott* held that a defendant who would not "have foreseen that Internet access would be a subject of discussion at sentencing," was entitled to notice that the court was contemplating a condition prohibiting internet access without prior permission of the probation officer. *Id.* The court explained that "[k]nowledge that a condition of this kind was in prospect would have enabled the parties to discuss" possible alternative provisions that might not have infringed on the defendant's liberty so dramatically and would have allowed defense counsel to research and more effectively argue the law regarding conditions of that type. *Id.* at 735.

Employing similar reasoning, the Tenth Circuit held in *Bartsma* that "the *Burns* rationale" – that "'the right to be heard has little reality or worth unless one is informed that a decision is contemplated'" – "applies when a district court is considering imposing a sex offender registration requirement as a condition of supervised release, and the condition is not on its face related to the offense charged." 198 F.3d at 1199-1200 (quoting *Burns*, 501 U.S. at 136). The court explained that the case before it, in which a sex offender registration special condition was imposed in sentencing a defendant on a felon in possession of a firearm charge, illustrated the concerns raised by the lack of notice:

> Neither party had any inkling the district court was considering imposing the sex offender registration requirement, so both

> sides were utterly unprepared to make reasoned arguments to the court. It strains credulity to argue Mr. Bartsma should have known registration was a possibility after his possession of a gun conviction. . . . Had the district court given the parties notice, they could have briefed the propriety of the condition, as well as the practical application. An intelligent, adversarial argument would have helped the court flesh out the problems with the current order.

Id. at 1199 n.6. The Tenth Circuit therefore held that "[f]undamental fairness requires notice" when a special condition "implicate[s] a liberty interest and there [is] a lack of any obvious nexus between the condition and the crime of conviction." *Id.* at n.7; *see also Atencio*, 476 F.3d at 1108; *Bruce*, 458 F.3d at 1167-68.

Irizarry has created uncertainty regarding whether it remains the law that notice is required prior to the imposition of special conditions. In two cases post-*Irizarry*, the Fifth Circuit has stated in *dicta* that "[w]hether, post *Booker*, sex offender conditions require notice, or even whether there is a notice requirement at all for any conditions in the context of supervised release, is unclear." *United States v. Weatherton*, 567 F.3d 149, 156 (5th Cir. 2009); *United States v. Ybarra*, 289 Fed. Appx. 726, 734 (5th Cir. 2008).

3. The Eleventh Circuit decision

Relying on the Court's opinion in *Irizzary*, the Eleventh Circuit rejected the notice rule established in the Fifth, Seventh, Ninth, and Tenth Circuit cases and held that the district court was not required to provide notice before it imposed sex offender special conditions of supervised release on Mr. Moran. App. 10. The Eleventh Circuit recognized that its decision was in conflict with the decisions of other circuit courts of appeals. App. 9 (citing *Atencio*, 476 F.3d at 1108; *Wise*, 391 F.3d at 1032-33; *Angle*, 234 F.3d at 346-47; *Coenen*, 135 F.3d at 941-43). It stated, however, that the conflicting opinions were based on the reasoning of *Burns*, which *Irizarry* subsequently held does not apply to variances from the Sentencing Guidelines. App. 9-10. It held that *Irizarry*'s reasoning should be extended to special conditions of supervised release. App. 10.

B. The Eleventh Circuit's decision is an unwarranted extension of *Irizarry* and is inconsistent with *Burns* and Rule 32(i)(1)(C).

The Eleventh Circuit's decision extends the rule stated in *Irizarry* beyond what the reasoning of that case will support. While the Court held in *Irizarry* that notice of a variance is not required to protect the parties' right under Rule 32(i)(1)(C) to comment on "matters relating to an appropriate sentence," the same is not true regarding special conditions of supervised release that a defendant should not

reasonably have been expected to anticipate. In holding that *Irizzary* should be extended to special conditions of supervised release, the Eleventh Circuit focused on the first of the factors the Court discussed in *Irizzary*, whether a defendant is entitled to expect a within-Guidelines sentence. The court of appeals stated that a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of supervised release" because "[t]he Guidelines contemplate that a defendant will receive a term of supervised release" and "[s]upervised release, by its nature, comes with conditions." App. 10-11. The Eleventh Circuit did not address the second or third factors discussed in *Irizarry* -- whether notice would affect the parties' presentation of argument and evidence and whether sentencing practices and the other procedural protections of Rule 32 would ensure that all relevant matters are considered before a sentence is determined. Neither factor applies to special conditions of supervised release that a defendant should not reasonably have expected. Instead, denial of notice regarding a potential special condition of supervised release may prevent defendants from being able to meaningfully comment on an important "matter[] relating to an appropriate sentence."

1. Notice of contemplated special conditions is necessary to ensure that the parties have an adequate opportunity to address the relevant factual and legal issues.

The Court stated in *Irizzary* that there was no indication that notice of the possibility of a variance "would have changed the parties' presentations in any material way; nor do we think it would in most cases." 128 S. Ct. at 2203. As the Court explained, the parties are on notice that the court might impose a sentence outside the applicable Sentencing Guidelines range. 128 S. Ct. at 2202-03. Accordingly, post-*Booker*, the parties know they must address at a sentencing proceeding all issues that bear on the question of how long the defendant should be incarcerated for his offense. The same cannot be said regarding special conditions of supervised release that are not among the statutory list of mandatory and discretionary conditions and have no nexus to the offense of conviction.

Anticipating any possible special condition of supervised release that is neither among the statutory mandatory or discretionary conditions nor related to the offense of conviction is a much more formidable task than being prepared to address the single question of how long a defendant should be imprisoned. Given that the variety of special conditions of supervised release a district court can

impose is virtually limitless,[1] holding defense counsel responsible for presenting the arguments and evidence relevant to any condition that could conceivably be imposed on a defendant with no notice that a special condition is contemplated is neither reasonable nor fair.

Moreover, depriving defendants of notice of the potential imposition of special conditions of supervised release that they cannot reasonably be expected to anticipate leads to precisely the harm identified in *Burns*: that "a critical sentencing determination will go untested by the adversarial process." *Burns*, 501 U.S. 137. This is the basis on which the pre-*Irizarry*

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[1] *See, e.g., United States v. May*, 568 F.3d 597, 608 (6th Cir. 2009) (special condition barring defendant from association with the financial services industry); *United States v. Rodriguez*, 558 F.3d 408, 412-14 (5th Cir. 2009) (special condition prohibiting defendant from unsupervised contact with minors, including his own children); *United States v. McCann*, 317 Fed. Appx. 405, 406 (5th Cir. 2009) (special condition prohibiting defendant from hunting); *United States v. Holman*, 532 F.3d 284, 288-91 (4th Cir. 2008) (special condition requiring intramuscular injections of anti-psychotic medications); *United States v. Mitchell*, 308 Fed. Appx. 162, 164-65 (9th Cir. 2009) (special condition prohibiting defendant from having or using a cell phone); *United States v. Rodriguez*, 178 Fed. Appx. 152, 157-58 (3d Cir. 2006) (special condition prohibiting defendant from having contact with her husband); *United States v. Cardine*, 192 Fed. Appx. 241, 242 (4th Cir. 2006) (special condition prohibiting defendant from "employment in the equestrian industry"); *United States v. Sicher*, 239 F.3d 289, 291-92 (3d Cir. 2000) (special condition barring defendant from entering two counties); *United States v. Stephan*, 9 Fed. Appx. 125, 126-27 (4th Cir. 2001) (special condition barring defendant from operating a motor vehicle).

opinions interpreted *Burns* and Rule 32 to require notice prior to the imposition of non-standard special conditions. *See Wise*, 391 F.3d at 1033 (notice of a special condition is required "so that counsel and the defendant will have the opportunity to address personally its appropriateness"); *Scott*, 316 F.3d at 735 (notice of special condition would have allowed counsel to research and comment more effectively regarding the condition); *Bartsma*, 198 F.3d at 1199 n.6 (notice would have allowed the parties to "brief[ ] the propriety of the condition" and make "[a]n intelligent, adversarial argument"); *Coenen*, 135 F.3d at 943 (notice would "serve to greatly further Rule 32's 'purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences'") (quoting *Burns*, 501 U.S. at 137).

Mr. Moran's case illustrates the manner in which lack of notice may interfere with a defendant's ability to meaningfully comment on special conditions. Having no inkling that sex offender special conditions were contemplated, defense counsel focused his presentation at sentencing on the charge Mr. Moran had been convicted of and the factors that might affect the appropriate term of incarceration for that charge: Mr. Moran's possession of the gun for reasons of self-defense, his ill health, and his cooperation with the government. Doc. 75 at 13-62. Prior to the pronouncement of sentence, neither Mr. Moran nor the government made any factual presentation or argument regarding the sex offense allegations,

Mr. Moran's risk of committing a sex offense in the future, or Mr. Moran's need for sex offender treatment or other sex offender special conditions. The first mention of sex offender special conditions was upon the pronouncement of sentence. At that point, defense counsel stated that he was not "prepared to respond to all of the sexual-offender special conditions" because he had not "previously been apprised that those" sanctions would be imposed and had not researched the legal issues related to the conditions. Doc. 75 at 80-81. Mr. Moran's counsel could only proffer what he believed the evidence was regarding the allegations that led to the charges against Mr. Moran and the sex offender treatment Mr. Moran had already been provided. Doc. 75 at 81-82.

Further, as discussed below, there were significant arguments that the sex offender special conditions are not reasonably related to Mr. Moran's history and characteristics, do not further the statutory purposes of sentencing, and infringe on Mr. Moran's liberty to an unwarranted degree. Had Mr. Moran been provided notice that the special conditions were contemplated and had an opportunity to meaningfully argue in opposition to those conditions, the district court might have been persuaded to reconsider some or all of the special conditions imposed on Mr. Moran. *See Wise*, 391 F.3d at 1033; *Scott*, 316 F.3d at 735; *Bartsma*, 198 F.3d at 1199 n.6.

2. The procedural protections of Rule 32 other than Rule 32(i)(1)(C) do not adequately protect a defendant's ability to comment on special conditions of supervised release.

The Court explained in *Irizarry* that there was no need to extend Rule 32(h) to variances because sentencing practices and the remaining procedural protections established in Rule 32 adequately ensure defendants' ability to comment on all relevant matters before a sentence is imposed. 128 S. Ct. at 2203-04. Specifically, along with Rule 32(i)(1)(C), the Court noted the requirements that defendants be provided copies of their PSRs in advance of sentencing, given an opportunity to object to the PSR, provided a final PSR stating all unresolved objections, and given an opportunity to speak at sentencing and present mitigation evidence. *Id.* at 2203 n.2 (citing Rule 32(e)(2), (f)(1), (g), (i)(4)(A)(ii)). By contrast, unless Rule 32(i)(1)(C)'s requirement that a defendant be allowed to comment on matters relating to the appropriate sentence is interpreted to require notice of contemplated special conditions, the remaining procedural protections discussed by the Court are inadequate to ensure that there is "focused adversarial resolution of the legal and factual issues relevant" to the imposition of special conditions. *Burns*, 501 U.S. at 137.

Rule 32's procedural requirements related to the PSR[2] will generally provide a defendant with notice of the factual matters and Guideline calculations that may affect the district court's determination of the appropriate term of incarceration; they do not provide a similar level of notice regarding special conditions the district court might impose. The PSR does not typically list potential special conditions of supervised release. As a result, while the parties' objections to the PSR ordinarily identify disputed issues regarding the application of the Guidelines and potential departures or variances, they do not ordinarily focus on the factual and legal issues related to possible special conditions.

Further, a defendant's opportunity to speak and put on mitigation evidence regarding special conditions of supervised release is meaningless if the defendant does not know what conditions are

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[2] PSRs are required to "identify all applicable guidelines and policy statements of the Sentencing Commission;" "calculate the defendant's offense level and criminal history category;" "state the resulting sentencing range and kinds of sentences available;" "identify any factor relevant to . . . the appropriate kind of sentence, [and] the appropriate sentence within the applicable sentencing range;" and "identify any basis for departing from the applicable sentencing range." Rule 32(d)(1). The PSR additionally must contain information regarding, among other things, "the defendant's history and characteristics, including . . . any prior criminal record; . . . the defendant's financial condition; and . . . any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." Rule 32(d)(2)(A).

contemplated. As discussed above, a defendant generally knows that the district court will decide at sentencing how many months or years the defendant must be imprisoned to achieve the statutory purposes of sentencing. *See* § 3553(a). The defendant would not necessarily know even that conditions of supervised release other than those identified by the relevant statute and Guideline might be imposed, much less what those conditions might be. In this case, for instance, Mr. Moran had been sentenced on five separate occasions since his 1994 sentencing for the single sex offense conviction on his record. PSR ¶¶ 33-37. In none of those sentencing proceedings were sex offender special conditions imposed. *Id.* Mr. Moran had no reason to believe that such conditions would be imposed on him in this case, and in fact his attorney had not anticipated that they were under consideration. App. 6.

The manner in which sentencing proceedings are usually carried out also fails to protect a defendant's ability to comment on this matter relating to an appropriate sentence. Here, as in many cases, there was no discussion of special conditions of supervised release until the sentence was pronounced. In the typical case in which the conditions of supervised release imposed on the defendant consist of the relevant mandatory and discretionary conditions identified in the Sentencing Guidelines, postponing discussion of conditions of supervised release is unlikely to make a difference in the sentencing presentation. In cases like this one, however, where

the defendant has no reason to expect the special conditions imposed, "first to impose the sentence, and then to invite counsel to comment. . . . is no notice at all." *Wise*, 391 F.3d at 1033.

C. Whether notice is required prior to the imposition of special conditions of supervised release is an important issue that is likely to recur.

The issue of whether notice is required prior to the imposition of special conditions of supervised release presents an important question regarding the interpretation of Rule 32(i)(1)(C)'s requirement that a defendant be allowed to comment on "matters relating to an appropriate sentence." In the wake of *Irizarry*, this question has become unsettled. The Fifth Circuit has described the law regarding the notice issue as "unclear," *Weatherton*, 567 F.3d at 156; *Ybarra*, 289 Fed. Appx. at 734, and in this case, the Eleventh Circuit broke with the four circuit courts of appeals that had held pre-*Irizzary* that notice is required.

This issue is also likely to recur. Prior to *Irizarry*, the courts had been presented in at least the eight circuit court opinions discussed above with the question of when notice of a special condition is required. The question had been raised in additional cases where the circumstances dictated that notice was not necessary. *See, e.g.*, *United States v. Jorge-Salgado*, 520 F.3d 840, 844 (8th Cir. 2008); *United*

States v. Burke, 252 Fed. Appx. 49, 54 (6th Cir. 2007); *United States v. McConville*, 206 Fed. Appx. 828, 831 (10th Cir. 2006); *United States v. McAlister*, 184 Fed. Appx. 613, 614-615 (9th Cir. 2006). In the time period since *Irizarry* of just over a year, the issue has arisen not only in this case, but also in the two Fifth Circuit cases. Granting certiorari would accordingly allow the Court to clarify this important question.

II. The Eleventh Circuit's decision conflicts with decisions of other circuit courts of appeals regarding the interpretation of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3.

Certiorari should be granted for the second reason that the Eleventh Circuit's opinion conflicted with decisions of other circuit courts of appeals regarding the interpretation of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3, which govern the imposition of conditions of supervised release. Under those provisions, three requirements limit a district court's discretion to impose special conditions of supervised release. First, the special conditions must be "reasonably related to" the statutory sentencing factors set forth at 18 U.S.C. Section 3553(a)(1) and (2)(B)-(D). § 3583(d)(1); § 5D1.3(b). That is, they must be reasonably related to "the nature and circumstances of the offense and the history and characteristics of the defendant" and the purposes of sentencing: "(B) to afford adequate deterrence to criminal conduct; (C) to protect the public from

further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." § 3553(a)(1), (2)(B)-(D). Second, the conditions must also involve "no greater deprivation of liberty than is reasonably necessary" to accomplish these statutory sentencing purposes of deterrence, protection of the public, and rehabilitation. §§ 3553(a)(2)(B)-(D), 3583(d)(2); § 5D1.3(b). Third, the special conditions must be consistent with the Sentencing Commission's policy statements. § 3583(d)(3); § 5D1.3(b). The Eleventh Circuit's opinion was inconsistent with the opinions of other courts of appeals regarding the interpretation of both the "reasonable relationship" requirement and the prohibition against undue infringement on a defendant's liberty.

A. The Eleventh Circuit's holding that sex offender conditions based on a single thirteen-year-old sex offense were reasonably related to the history and characteristics of the defendant and the statutory purposes of sentencing conflicts with decisions of the Sixth, Eighth, and Ninth Circuits.

The Eleventh Circuit's opinion conflicts with the opinions of the Sixth, Eighth, and Ninth Circuits in *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006); *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001); *United States v. Kent*, 209 F.3d 1073 (8th Cir. 2000);

and *United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003), regarding the interpretation of Section 3583(d) and Section 5D1.3's requirement that special conditions be "reasonably related to" "the nature and circumstances of the offense and the history and characteristics of the defendant" and the statutory purposes of sentencing. § 3583(d)(1); § 5D1.3(b); § 3553(a)(1), (2)(B)-(D). Those cases hold that a defendant's commission of a sex offense that is remote in time, without more, does not establish the requisite relationship between sex offender special conditions and the defendant's history and characteristics or the statutory purposes of sentencing. *See Carter*, 463 F.3d at 532; *T.M.*, 330 F.3d at 1240; *Scott*, 270 F.3d at 636; *Kent*, 209 F.3d at 1077.

As the court of appeals acknowledged, App. 13, there is no dispute in this case that the "nature and circumstances of the offense" bore no relationship to the sex offender special conditions. Sex-offender special conditions are "not reasonably related to being a felon in possession of a firearm." *United States v. Carter*, 463 F.3d 526, 530 (6th Cir. 2006).

In holding that the sex offender special conditions were reasonably related to Mr. Moran's history and characteristics and the statutory purposes of sentencing based on a single thirteen-year-old sex offense,[3] the Eleventh Circuit broke with the Sixth,

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[3] The court of appeals also discussed sex offense allegations that Mr. Moran was never convicted of. App. at 3-4. It is unclear

(Continued on following page)

Eighth, and Ninth Circuits. Each of those courts has held that a conviction for a single sex offense over a decade prior to sentencing is too remote to be reasonably related to a defendant's present situation. The Eighth Circuit held in *Scott* that it was unreasonable to impose sex offender conditions based on a fifteen-year-old sex offense where there was "no evidence supporting the need for the special conditions" because the government had "presented no evidence that [the defendant had] a propensity to

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from the court of appeals' opinion whether it relied on the unsubstantiated allegations in affirming the conditions of supervised release imposed on Mr. Moran. To the extent it did so, its opinion would conflict with this Court's holding that criminal charges a defendant has not been convicted of may be treated as relevant conduct only if the district court finds that the government proved by a preponderance of the evidence that the defendant committed those acts. *United States v. Watts*, 519 U.S. 148, 155-56 (1997); *see also United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995). The government made no attempt at sentencing to establish that Mr. Moran committed the alleged sex offenses; nor did the district court make the required finding that the government had proven these alleged offenses by the preponderance of the evidence. The court of appeals additionally alluded to the facts that Mr. Moran "was discovered in a household containing a minor female" and "had failed to register as a sex offender." App. 13. Although the PSR recites that at the time of his arrest, Mr. Moran was "living with his girlfriend and her minor niece," PSR ¶ 8, at that time, nothing prohibited Mr. Moran from living in the same household as a minor. There has never been any allegation Mr. Moran engaged in any inappropriate conduct with the minor. Failure to register as a sex offender is not a "sex offense" for purposes of determining the special conditions of supervised release applicable to sex offense defendants. *See* U.S.S.G. § 5D1.2, App. Note 1; § 5D1.3(d)(7).

commit any future sex offenses, or that [the defendant had] repeated this behavior." 270 F.3d at 636. Without evidence that the defendant presently had a propensity to commit sex offenses, the Eighth Circuit stated, sex offender conditions "seem unlikely to serve the goals of deterrence or public safety, since the behavior on which the special conditions are based . . . has ceased." *Id.* Similarly, the Eighth Circuit held in *Kent* that an allegation of spousal abuse thirteen years prior to sentencing did not justify a condition of supervised release requiring psychological treatment. 209 F.3d at 1077. It stated that the evidence did not establish treatment was needed where "the government failed to provide any testimony from a medical expert aimed at addressing [the defendant's] current mental condition" and "the use of the condition as a deterrent makes little sense in light of the fact that the behavior to be deterred had ceased independently." *Id.*

In *T.M.*, the Ninth Circuit relied on *Scott* and *Kent* to hold that sex offenses twenty and forty years prior to sentencing were too remote to justify sex offender special conditions. 330 F.3d at 1240. "Supervised release conditions predicated upon twenty-year-old incidents, without more, do not promote the goals of public protection and deterrence," the court stated. *Id.* "The fact that [the defendant] has lived the last twenty years without committing a sex offense suggests that he no longer needs to be deterred or shielded from the public." *Id.*

The Sixth Circuit adopted *Scott*, *Kent*, and *T.M.* in its opinion in *Carter*. 463 F.3d at 531-532. Based on the rationale of those cases, it held that sex offenses seventeen years prior to sentencing were too remote to be reasonably related to sex-offender special conditions. *Id.* at 532.

The basis for the district court's imposition of sex offender special conditions on Mr. Moran was his single sex offense conviction based on conduct that allegedly took place over thirteen years prior to sentencing. The Eleventh Circuit's opinion thus conflicted with the Sixth, Eighth, and Ninth Circuit opinions in holding that Mr. Moran's remote-in-time sex offense conviction was reasonably related to Mr. Moran's history and characteristics and promoted the purposes of sentencing. The Eleventh Circuit stated in its opinion that the sex offender conditions would further the statutory purposes of rehabilitation and protection on the public. App. 13, 15, 16. But, just as in *Scott* and *Kent*, there was no evidence here that Mr. Moran is in need of rehabilitation to prevent him from committing a new sex offense. The government also offered no evidence that he has a propensity to commit future sex offenses or that Mr. Moran is in need of treatment – or any of the sex offender conditions – to prevent him from doing so or to protect the public from him. Mr. Moran has not been convicted of any sex offense since 1994. Sex offender treatment was ordered in connection with Mr. Moran's 1994 conviction. PSR ¶ 33; Doc. 75 at 81. Mr. Moran has been sentenced in state and federal courts

five times in the interim since the 1994 conviction without sex offender conditions having been imposed. In short, this case presents the same set of circumstances that the Sixth, Eighth, and Ninth Circuits held to be insufficient to justify the imposition of sex offender special conditions.

B. The Eleventh Circuit's holding that a condition prohibiting internet access is not a greater deprivation of liberty than necessary to achieve the statutory purposes of sentencing where there was no nexus between computers or the internet and the offense of conviction or any prior wrongful conduct conflicts with opinions of the Second, Third, Seventh, and Eighth Circuits.

The Eleventh Circuit's affirmance of the condition of supervised release prohibiting Mr. Moran from using the internet without the prior written permission of his probation officer conflicts with the opinions of the Second, Third, Seventh, and Eighth Circuits in *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001); *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003); *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003); *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003); and *United States v. Crume*, 422 F.3d 728 (8th Cir. 2005). Each of these cases interprets the requirement that conditions of supervised release

must involve "no greater deprivation of liberty than is reasonably necessary" to accomplish the statutory purposes of sentencing. §§ 3553(a)(2)(B)-(D), 3583(d)(2); § 5D1.3(b). The Eleventh Circuit's opinion conflicts with *Peterson* by affirming a condition prohibiting internet access where there was no nexus between any wrongdoing by the defendant and computers or the internet. The opinion in this case further conflicts with the remaining cited opinions of the Second, Third, Seventh, and Eighth Circuits holding that the precise condition imposed in this case is overly restrictive.

Peterson holds that a prohibition against access to the internet is overbroad where there was no evidence that the defendant's prior sex offense "had any connection to computers or to the Internet." *Peterson*, 248 F.3d at 82-84; *cf. also United States v. Barsumyan*, 517 F.3d 1154, 1161 (9th Cir. 2008) (special condition prohibiting use of computers was overbroad where there was "no indication that [the defendant] used a computer in any" crime). "Conditions of supervised release must be supported by some evidence that the condition imposed is tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns." *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007). "A condition with no basis in the record, or with only the most tenuous basis, will inevitably violate § 3583(d)(2)'s command that such conditions involve no greater deprivation of liberty than is reasonably necessary." *Id.* (quoting

United States v. Pruden, 398 F.3d 241, 249 (3d Cir. 2005)). Just as in *Peterson*, there was no nexus in this case between use of computers or the internet and any alleged wrongdoing by Mr. Moran. Although the Eleventh Circuit opinion does not acknowledge the conflict, its opinion thus conflicts with *Peterson*.

The remaining Second, Third, Seventh, and Eighth Circuit opinions cited above hold the precise condition at issue here – a prohibition against access to the internet without prior permission of the probation officer – to be a greater restriction on liberty than necessary, even though each of the cited cases involved a nexus between the condition and the defendant's history. *See Crume*, 422 F.3d at 733 (defendant convicted of possession of child pornography); *Freeman*, 316 F.3d at 391-92 (same); *Sofsky*, 287 F.3d at 126 (same); *Scott*, 316 F.3d at 735-36 (defendant found in possession of child pornography). The courts recognize that "[c]omputers and Internet access have become virtually indispensable in the modern world." *Peterson*, 248 F.3d at 83. A ban on internet access "renders modern life – in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website – exceptionally difficult." *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003). The courts have accordingly required narrow tailoring of Internet restrictions. *See United States v.*

Holm, 326 F.3d 872, 878-79 (7th Cir. 2003) (collecting cases). As the Second Circuit stated in *Sofksy*:

> [A]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. The same could be said of a prohibition on the use of the mails imposed on a defendant convicted of mail fraud. A total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication and . . . prevents other common-place computer uses such as doing any research, getting a weather forecast, or reading a newspaper online.

287 F.3d at 126 (quotations, citations, and alterations omitted).

In affirming the internet prohibition, the Eleventh Circuit relied on its prior opinion in *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), affirming a special condition prohibiting a child pornography defendant from access to the internet. *Zinn* recognized that its holding conflicted with the Second Circuit's opinion in *Sofsky* and the Third Circuit's opinion in *Freeman* and relied on the contrary opinions in *United States v. Paul*, 274 F.3d 155, 169-70 (5th Cir. 2001), and *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001). 321 F.3d at 1093. The Eleventh Circuit also distinguished *Peterson* in *Zinn*, stating that the internet restriction in *Peterson* was based on a prior sex offense that was unrelated to the

internet, while in the case before it, the internet prohibition bore "a strong tie to the offenses that precipitated" the challenged condition.[4] 321 F.3d at 1093 n.12. In this case, notwithstanding that this distinction with *Peterson* does not exist, the Eleventh Circuit held that the condition prohibiting internet access "is not unduly restrictive." App. 16. The Eleventh Circuit's affirmance of the same special condition prohibiting internet access that has been held to be overly broad by the Second, Third, Seventh, and Eighth Circuits, in a case involving no nexus between the internet and any wrongdoing by the defendant, creates a conflict that warrants review by this Court.

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[4] The defendants in *Paul* and *Walser* had likewise engaged in wrongdoing related to the use of the internet. 274 F.3d at 169; 275 F.3d at 988.

CONCLUSION

For the reasons set forth above, Petitioner Virgil Moran's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: September 29, 2009

[PUBLISH]

IN THE UNITED STATES COURT OR APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16987
Non-Argument Calendar

D.C. Docket No. 06-00048-CR-T-17EAJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VIRGIL LEE MORAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(July 1, 2009)

Before BIRCH, HULL and PRYOR, Circuit Judges.

PRYOR, Circuit Judge:

This appeal presents an issue of first impression: whether a defendant is entitled to notice before a district court may impose special conditions of supervised release to address a defendant's proclivity to sexual misconduct when the crime of conviction did not involve sexual activity. Virgil Lee Moran, a

convicted sex offender, was convicted of being a felon in possession of a firearm after officers discovered him living with his girlfriend and her minor daughter in violation of his terms of supervised release for an earlier conviction. Soon after officers discovered Moran in that residence, state officials charged him with failing to register as a sex offender. Moran argues that he was entitled to notice before the district court imposed special conditions of supervised release related to potential sexual misconduct. Moran also argues that there is no reasonable relationship between those special conditions and his conviction for being a felon in possession of a firearm. 18 U.S.C. §§ 922(g)(1), 924(e). In the light of the decision of the Supreme Court in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), we conclude that no notice was necessary. We also conclude that the district court did not abuse its discretion in imposing the special conditions on Moran's supervised release. We affirm.

I. BACKGROUND

In 2003, Moran began a three-year term of supervised release following his conviction in 1998 for unlawfully transporting firearms and knowingly making false statements in the acquisition of those firearms. One year later, a confidential informant told Moran's probation officer that Moran was not living with his mother. Because Moran had failed to report a change of residence, the probation office obtained a warrant to search Moran's new residence. During the search, probation officers and agents of the Bureau of

Alcohol, Tobacco, Firearms, and Explosives discovered among Moran's personal items a .25 caliber firearm.

Moran was indicted as a felon in possession of a firearm. The indictment alleged that Moran possessed a firearm following his conviction for three crimes: grand theft, committing a lewd and lascivious act on a child, and dealing in stolen property. Moran pleaded guilty to the possession charge without the benefit of a plea agreement.

The presentence investigation report stated that Moran was discovered by police living with his girlfriend and her minor daughter. State officials later charged Moran with failing to register as a sex offender living at that address. Fla. Stat. § 943.0435. The report mentioned that Moran had an outstanding arrest warrant for that offense.

The presentence report described, among the 23 arrests, charges, and convictions amassed by Moran, two convictions for sex-related crimes. In August 1994, Moran pleaded no contest to committing a lewd and lascivious act on a child under the age of sixteen and was sentenced to prison and sex offender counseling. The report stated that, while Moran's girlfriend was babysitting a four-year-old girl, Moran followed the child into a bathroom, placed her on a vanity, and inserted his finger into her vagina. Also in August 1994, Moran pleaded no contest to assault as a lesser-included offense of sexual assault. The report stated

that Moran had forced the victim at knifepoint into his truck, where he beat, kicked, and raped her.

The presentence report also stated that Moran had been arrested in Florida on three occasions for sexual crimes against his wife and child. In January 1994, Moran was charged for the kidnapping, false imprisonment, and sexual assault of his wife, Tonia Moran, after she reported that Moran had used a knife to imprison and sexually assault her for two days. The charges were later dropped. In March 1994, Moran was charged for the sexual battery by force and aggravated battery of Tonia after she reported that Moran beat her, choked her, and forced her at knifepoint to have sex. Those charges were dropped as well. In October 1995, Moran was charged for sexual battery and committing a lewd and lascivious act on a child under the age of twelve after he allegedly sexually assaulted and beat his daughter. These charges were nol prossed.

Moran objected to the presentence report. Moran denied abusing his wife and child and argued that his sister-in-law had concocted the allegations. Moran requested the district court grant a downward departure because Moran possessed the firearm for self-protection. United States Sentencing Guideline § 5K2.12 (Nov. 2004). Moran did not contest his conviction of a sex offense against a minor in 1994.

At the sentencing hearing, Moran testified that he possessed a firearm because his mother's neighbor had threatened to kill him. The district court

accepted Moran's testimony "at face value," but commented that the threats "occurred . . . because of your past history and the impression of that neighbor regarding your past history with regard to children." The district court remarked that Moran's "history at the age of 42[,] . . . [his] conduct towards children, including a child at the age of four, . . . [a]nd [his] continual activity of crime and sexual activity of people in varying ages is nothing to be proud of." The district court denied Moran's request for a downward departure.

The district court sentenced Moran to 63 months of imprisonment and three years of supervised release. In addition to the standard conditions of release, the district court imposed several special conditions of release. The special conditions required Moran to "participate in a mental health program specializing in sex-offender treatment"; register under the Sexual Offender Registration and Notification Act as a sex offender in "any state where he resides, visits, is employed, carries on a vocation, or is a student, as directed by his probation officer"; comply with instructions from his probation officer to provide state officials with information required by the Florida Sexual Predators Act, Fla. Stat. § 943.0435(2); refrain from "direct contact with minors under the age of 18 without the written approval of [his] probation officer and . . . refrain from entering into any area where children frequently congregate, including schools, daycare centers, theme parks, and playgrounds, et cetera"; refrain from

possessing, subscribing, or viewing "any video, magazines, or literature depicting children in the nude and/or in sexually explicit positions"; "not possess or use a computer with access to any online service at any location, including employment, without written approval from [his] probation officer"; and "submit to a search of his person, residence, place of business, any storage units under his control, computer or vehicle at a reasonable time in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release."

When the district court asked for objections, defense counsel stated that he had "a generalized objection, because [he was] not really prepared to respond to all of the sexual-offender conditions. . . ." The district court responded that Moran could respond after a break for lunch. When the hearing resumed, defense counsel "advise[d] the Court that [he] hadn't . . . previously been apprised that those were going to be the sanctions that would be imposed" and, even though he had not "specifically examined the statutes that might be behind those," he "couch[ed] an objection" based on the staleness of Moran's "sexual offense in 1994," his lack of recidivism, and the failure of the court earlier to "impose these kinds of conditions" for transporting firearms. Defense counsel argued that the "allegations that surfaced" regarding Moran's wife and child were "false accusations" and "came out to be unsubstantiated to the point where they didn't even prosecute him." Defense counsel also argued that the decision to

impose the special conditions "on the basis of what happened in 1994 might subject [Moran] to unnecessary conditions of supervised release" and suggested as an alternative that Moran undergo "a mental evaluation and then treatment as necessary if someone, a professional, evaluates him and determines that" Moran "is some kind of a threat or has some sort of a problem to go forward."

The district court asked the probation officer for his opinion "with regard to the litany of restrictions." The probation officer responded that "the sex-offender treatment is dynamic" and that Moran "would be evaluated throughout the process" and could be released "[i]f at some point Mental-Health Treatment doesn't feel he needs the treatment. . . ." The probation officer expressed concern that "the least [Moran] did was commit a lewd and lascivious act on a four-year-old child"; "recommend[ed] the sexual-offender treatment"; and agreed with the "rest of the other restrictions[.]" The district court overruled Moran's objection.

II. STANDARDS OF REVIEW

We review the imposition of special conditions of supervised release for abuse of discretion. *United States v. Taylor*, 338 F.3d 1280, 1283 (11th Cir. 2003). "We will reverse only if we have a 'definite and firm conviction that the [district] court committed a clear error of judgment in the conclusion it reached.'" *Id.* (quoting *Davenport Recycling Assocs. v. Comm'r of*

Internal Revenue, 220 F.3d 1255, 1258 (11th Cir. 2000)). Objections not raised in the district court are reviewed for plain error. *United States v. Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006).

III. DISCUSSION

Moran challenges two aspects of the special conditions imposed by the district court. First, Moran argues that the district court should have made him aware it planned to impose special conditions of supervised release. Second, Moran argues there is no reasonable relationship between the special conditions and his offense of conviction. We address each argument in turn.

A. Moran Was Not Entitled To Notice of an Intent To Impose Special Conditions.

Moran argues that he is entitled to a new sentencing hearing because the district court failed to provide notice that it intended to impose special conditions on his supervised release. Moran argues that, if he had received notice, he would have marshaled evidence to refute the dismissed charges of sexual misconduct involving his wife and child. Moran contends that the recess granted by the district court did not correct this deficiency.

The government responds that we should review for plain error because Moran failed to present the issue of notice to the district court, but we disagree. Moran complained to the district court about the lack

of notice. "To preserve an issue for appeal, one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought." *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 40 (2008). Moran told the district court that he did not anticipate the special conditions, he was not familiar with the relevant statutes, and his ability to respond was hampered by the lack of notice.

Moran contends that the demands of due process that motivated the Supreme Court in *Burns v. United States*, 501 U.S. 129, 111 S. Ct. 2182 (1991), to require notice before departing upward under the Sentencing Guidelines mean that notice is also required before the district court can impose special conditions of supervised release, but we disagree. Some of our sister circuits have required notice before the imposition of sex offender special conditions, *see United States v. Atencio*, 476 F.3d 1099, 1108 (10th Cir. 2007), *overruled on other grounds by Irizarry v. United States*, 128 S. Ct. 2198, 2201 n.1, (2008); *United States v. Wise*, 391 F.3d 1027, 1032-33 (9th Cir. 2004); *United States v. Angle*, 234 F.3d 326, 346-47 (7th Cir. 2000); *United States v. Coenen*, 135 F.3d 938, 941-43 (5th Cir. 1998), but those decisions are based on the reasoning in *Burns*. A more recent decision of the Supreme Court explains that *Burns* required notice only in the "narrow category of cases" that involved an upward departure for an aggravating or mitigating circumstance that had not been accounted

for "in formulating the guidelines," 18 U.S.C. § 3553(b), and was not identified as a reason to depart in either the presentence investigation report or a prehearing pleading, *Irizarry*, 128 S. Ct. at 2202. The Supreme Court affirmed a decision of this Court, *see Irizarry v. United States*, 458 F.3d 1208, 1212 (11th Cir. 2006), that the notice requirement of *Burns* does not apply to a variance from the advisory range under the Sentencing Guidelines. The Court reasoned that its decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), eradicated any genuine expectation that a defendant would necessarily receive a sentence within the advisory guideline range. *Irizarry*, 128 S. Ct. at 2202. The Court expressed confidence that the procedural protections afforded in Federal Rule of Criminal Procedure 32, such as the rights to review and object to the presentence report and to comment and present mitigating evidence, coupled with the "'fluid and dynamic process'" of sentencing, would allow a defendant to anticipate and respond to facts that would affect the final sentence. *Id.* at 2203-04 & n.2 (quoting *United States v. Vega-Santiago*, 519 F.3d 1, 4 (1st Cir. 2008) (en banc)). The same is true here.

A defendant ordinarily should not be surprised when a sentencing court imposes conditions of supervised release. The Guidelines contemplate that a defendant will receive a term of supervised release. 18 U.S.C. § 3583(a). Supervised release is mandated whenever a sentence exceeds one year of imprisonment and may be imposed at the discretion of the

district court "follow[ing] imprisonment in any other case." U.S.S.G. § 5D1.1. Supervised release, by its nature, comes with conditions.

The district court was not required to notify Moran before it imposed special conditions to address his proclivity for sexual misconduct. Although Moran expressed surprise that his history of sexual misconduct affected the conditions of his supervised release, he did not allege, nor does the record suggest, that he was prejudiced by the court's pronouncement. Moran's misconduct was detailed in the presentence investigation report, and the record reflects that Moran knew the district court likely would consider his criminal history in determining an appropriate sentence. Moran addressed the allegations of sexual misconduct both before and at sentencing, and he did not move for a continuance to develop additional arguments or submit evidence to refute those allegations.

B. The District Court Did Not Abuse Its Discretion By Imposing Special Conditions of Supervised Release.

Moran challenges the special conditions of his supervised release. Moran argues that the conditions are not reasonably related to the nature and circumstances of his conviction, his history and characteristics, or the purposes of sentencing and they unnecessarily infringe on his liberty. We address

these concerns as they relate to each special condition of Moran's supervised release.

The district court must consider what conditions best accomplish the purposes of sentencing. 18 U.S.C. § 3583(c). The court must consider the history and characteristics of the defendant, provide both adequate punishment and rehabilitation of the defendant, and protect society at large. *Id.*; *see also id.* § 3553(a). "[I]t is not necessary for a special condition to be supported by each factor enumerated in § 3553(a). Rather, each is an independent consideration to be weighed." *United States v. Zinn*, 321 F.3d 1084, 1089 (11th Cir. 2003) (citing *United States v. Bull*, 214 F.3d 1275, 1278 (11th Cir. 2000)). Although "a condition of supervised release should not unduly restrict a defendant's liberty, a condition is not invalid simply because it affects a probationer's ability to exercise constitutionally protected rights." *Id.*

1. Moran's History and Characteristics Support the Decision To Impose Mental Health Treatment.

Moran complains that he should not be required to participate in a mental health program for sex offenders, but we disagree. The Sentencing Guidelines recommend that a district court order, as a special condition of supervised release, that the defendant participate in a mental health treatment program "[i]f the court has reason to believe that the defendant is in need of psychological or psychiatric

treatment." U.S.S.G. § 5D1.3(d)(5). Moran has a documented history of sex-related offenses, and he does not dispute that he is a convicted sex offender. Treatment could assist Moran in avoiding similar future misconduct, which would protect the public. *See* 18 U.S.C. 3583(c); *id.* § 3553(a)(2)(C).

Moran offers four reasons that this condition was imposed in error, but none of his reasons are persuasive. First, Moran argues that the special condition is not related to his conviction, but we have approved of mental treatment to address unrelated prior crimes. *See Bull*, 214 F.3d at 1276-78. Second, Moran contends that the remoteness of his previous conviction for a sexual offense establishes that he does not require treatment, but Moran's conviction was not too remote. *See United States v. York*, 357 F.3d 14, 21 (1st Cir. 2004) (affirming, as a term of supervised release for mailing a threatening letter to an estranged common law spouse, the imposition of sex offender special conditions based on convictions for indecent assault on minors three and nine years earlier). Moran's argument also ignores that he was discovered in a household containing a minor female soon after his release from prison and had failed to register as a sex offender under state law. Third, Moran assumes that treatment would be unduly burdensome because of his heart condition, but he provides no explanation how the program would exacerbate that condition. Fourth, Moran complains for the first time on appeal that the treatment program would inflict an "'excessive infringement'" on his liberty, but the record

does not support his argument. The probation officer testified that Moran would undergo regular evaluations and, if further treatment was unnecessary, he would be released from the program. Based on Moran's history and characteristics, the district court did not abuse its discretion, much less plainly err, by ordering Moran to undergo mental treatment as a sex offender.

2. Moran Was Required To Register As a Sex Offender.

Moran argues that he should not have to register as a sex offender because that special condition is not reasonably related to his conviction as a felon in possession of a firearm, but we disagree. The Sex Offender Registration and Notification Act requires a sex offender to register in each jurisdiction where he resides, is employed, or is a student. 42 U.S.C. § 16913(a). Although Moran was convicted before the effective date of the Act, its provisions "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3 (2007). Because federal law requires a sentencing court to "order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision[,]" 18 U.S.C. § 3583(d), Moran's failure to register under the Act and the applicable state law, Fla. Stat. § 943.0435, would have violated this mandatory condition of supervised release. The district court did not abuse

its discretion by requiring Moran to register as a sex offender.

3. Moran's History Supports a Limit on Contact With Minors.

Moran challenges for the first time on appeal the special condition that he refrain from direct contact with minors as burdening his freedom of private association, but his argument is foreclosed by our decisions in *Zinn*, 321 F.3d at 1088, and *Taylor*, 338 F.3d at 1286. Moran acknowledges that the right of association "may properly be restricted where the doing so is necessary to protect the public," and the district court was entitled to find that a restriction on Moran's affiliation with children was justified based on previous incidents involving minor victims. Because the special condition promotes rehabilitation and protects the public, the district court did not plainly err by restricting Moran's contact with minors.

4. Moran's History Supports a Restriction on Video and Printed Sources of Child Pornography.

Moran challenges the restriction on his ability to access different sources of media, but this argument fails. Moran was previously convicted of a sexual offense against a child and an offense that involved both violence and sexual misconduct. Limiting access to materials that encourage, if not further cultivate,

those prurient interests, protects the public. *See* 18 U.S.C. § 3553(a)(2)(C). We cannot say that the decision of the district court to impose this condition was an abuse of discretion.

5. A Restriction on Access To the Internet Is a Reasonable Condition of Supervised Release.

Moran complains that the limitation on access to the internet infringes on his liberty and, given his health condition, "effectively cut[s] off his ability to interact with the outside world[,]" but we rejected a similar argument in *Zinn*. Although the internet provides valuable resources for information and communication, it also serves as a dangerous forum in which an offender can freely access child pornography and communicate with potential victims. Moran may "still use the Internet for valid purposes by obtaining his probation officer's prior permission." *Zinn*, 321 F.3d at 1093. Although the condition infringes on Moran's liberty, it is not unduly restrictive. The district court did not abuse its discretion.

6. Moran Is Required To Submit to Reasonable Searches.

Moran also challenges the special condition that he submit to searches based on reasonable suspicion, but that condition is warranted. A sentencing court has discretion to

> order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property . . . and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct.

18 U.S.C. § 3583(d). Based on evidence that Moran had in the past violated the terms of his supervised release, the district court did not abuse its discretion by imposing the condition.

IV. CONCLUSION

We **AFFIRM** Moran's sentence.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

VIRGIL LEE MORAN

JUDGMENT IN A CRIMINAL CASE

(Filed Jul. 1, 2008)

CASE NUMBER: 8:06-CR-48-T-17EAJ

USM NUMBER: 21866-018

Defendant's Attorney: John Fernandez, CJA

THE DEFENDANT:

X pleaded guilty to count(s) one of the Indictment.

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm	March 11, 2004	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

If ordered to pay restitution, the defendant must notify the court and United States Attorney of material change in economic circumstances.

Date of Imposition of Sentence: April 27, 2007

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

DATE: April 30th, 2007

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of SIXTY-THREE (63) MONTHS as to count one of the Indictment with credit for time served to be calculated by the United States Bureau of Prisons.

X The court makes the following recommendations to the United States Bureau of Prisons:

(1) Incarceration at FMC Rochester, MN or FMC Lexington, KY.

(2) Immediate medical evaluation and designation re: life threatening cardiac conditions documented in medical records. Defendant should not be incarcerated in conditions adverse to his health.

(3) Appropriate mental health counseling consistent with record in PSR.

(4) Substance abuse counseling.

(5) Provide secondary education. Then procure GED. Evaluate vocational consistent with restrictions.

X The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 8/7/07 to BTF at 12:15 pm, with a certified copy of this judgment.

/s/ [Illegible]
United States Marshal

By /s/ [Illegible]
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THIRTY-SIX (36) MONTHS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

__ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

__ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

__ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

__ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

(X) The defendant shall participate in a mental health program specializing in sex offender treatment and follow the probation officer's instructions regarding the implementation of this Court directive. The defendant will abide by the rules, requirements, and conditions of the treatment program, including submitting to polygraph testing. Further, the defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Treatment Services.

(X) The defendant shall register with state sexual offender registration agency(s) in any state where he resides, visits, is employed, carries on a vocation, or is a student, as directed by the probation officer.

(X) The probation officer will provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

(X) The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children

frequently congregate including: schools, daycare centers, theme parks, playgrounds, etc.

(X) The defendant is prohibited from possessing, subscribing to or viewing any video, magazines, or literature depicting children in the nude and/or in sexually explicit positions.

(X) The defendant shall not possess or use a computer with access to any online service at any location (including employment) without written approval from the probation officer. This includes access through any internet service provider, bulletin board system, or any public or private computer network system. The defendant shall permit routine inspection of his computer system, hard drives, and other media storage materials, to confirm adherence to this condition. This inspection shall be no more intrusive than is necessary to ensure compliance with this condition. The defendant shall inform his employer, or other third party who may be impacted by this condition, of this computer-related restriction and the computer inspection provision of the condition.

(X) The defendant shall submit to a search of his person, residence, place of business, any storage units under his control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the

defendant shall inform any other residents that the premises may be subject to a search pursuant to these conditions.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	**$100.00**	**$Waived**	**$N/A**

__ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

__ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _____	$ _____	

__ Restitution amount ordered pursuant to plea agreement $ _____.

__ The defendant must pay interest on a fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__ the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996.

A. X Lump sum payment of $ 100.00 due immediately.

__ not later than _____, or

__ in accordance __ C, __ D, __ E, or __F below; or

B. __ RESTITUION PAYMENTS:
While in Bureau of Prisons custody, the defendant shall either (1) pay at least $25 quarterly if the defendant has a non-Unicor job or (2) pay at least 50% of his monthly earnings if the defendant has a Unicor job. Upon release from custody, the defendant is ordered to begin making payments of $200 per month and this payment schedule shall continue until such time as the Court is notified by the defendant, the victim or the government that there has been a material change in the defendant's ability to pay.

C. __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ days (e.g., 30 or 60 days) after the date of this judgment; or

D. __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. __ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from

imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. __ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

X The Court Orders that the defendant forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, which are in the possession or control of the defendant or the defendant's nominees. The items to be forfeited include, but are not limited to: the Brescia Armas

.25 caliber handgun and rounds of .25 caliber ammunition seized on the date of arrest.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 16 2010
OFFICE OF THE CLERK

No. 09-392

In the Supreme Court of the United States

VIRGIL MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled under Federal Rule of Criminal Procedure 32(i)(1)(C) to receive pre-sentencing notice of potential conditions of supervised release.

2. Whether sex-offender conditions of supervised release were "reasonably related" to statutory sentencing goals under 18 U.S.C. 3583(d), 18 U.S.C. 3553(a), and Sentencing Guidelines § 5D1.3, when the crime of conviction did not involve sexual activity, but petitioner had a 13-year-old conviction for a sex offense against a four-year-old girl, had an additional conviction related to a sexual assault, had failed to register as a sex offender as required by state law, and had violated his earlier conditions of supervised release.

3. Whether it was "reasonably necessary" for the achievement of the statutory sentencing goals set out in 18 U.S.C. 3553(a) to condition petitioner's use and possession of an Internet-accessible computer on his probation officer's approval, in light of his prior sex offense against a four-year-old girl, his additional conviction related to a sexual assault, his failure to register as a sex offender, and his earlier violation of conditions of supervised release.

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In the Supreme Court of the United States

No. 09-392

VIRGIL MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 573 F.3d 1132.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). He was sentenced to 63 months of imprisonment, to be followed by three years of super-

vised release. Pet. App. 18-20. The court of appeals affirmed. *Id.* at 1-17.

1. In 1994, petitioner pleaded no contest to state-law charges of lewd and lascivious conduct on a child under the age of 16 (arising from an incident when he inserted his finger into the vagina of a four-year-old girl) and assault (arising from a separate incident when he beat, kicked, and raped a woman at knifepoint). Pet. App. 3-4. As a condition of probation, petitioner was required to attend sex-offender counseling. Presentence Investigation Report ¶ 33 (PSR).

In 1998, petitioner was convicted in federal court for unlawfully transporting firearms and knowingly making false statements in acquiring them. Pet. App. 2. In 2004, he failed to report a change of residence to his probation officer. *Ibid.* When federal officers searched petitioner's residence, they discovered a .25-caliber firearm among his possessions. *Id.* at 2-3.

Petitioner was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 2-3. The indictment noted his prior convictions for grand theft, committing a lewd and lascivious act on a child, and dealing in stolen property. *Id.* at 3. Petitioner pleaded guilty to the charged offence without a plea agreement.[1] *Ibid.* By the time of his federal sentencing hearing, petitioner had also been charged under Florida law with failing to register as a

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[1] The PSR also indicated that petitioner had been arrested on three separate occasions in 1994 and 1995 for sexual misconduct against his wife and child. On each occasion, the charges were ultimately dropped. Petitioner objected to their inclusion in the PSR, the sentencing court accepted petitioner's claims of innocence "at face value," and the court of appeals repeated but did not otherwise rely on those accusations. Pet. App. 4-5.

sex offender and had an outstanding arrest warrant for that offense. *Ibid.*

2. On April 27, 2007, the district court sentenced petitioner to 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. 19-20. The district court also imposed both standard and special conditions on petitioner's supervised release. *Id.* at 22-26. The special conditions required petitioner to participate in a mental health program for sex offenders; to register with sex-offender registries in any State where he resides, visits, is employed, or is a student, subject to his probation officer's direction; to supply his probation officer with information required by the Florida sexual predator and sexual offender notification and registration statutes; to avoid direct contact with minors and areas where minors typically congregate without his probation officer's written approval; not to possess child pornography; not to possess or use a computer with Internet access without his probation officer's approval; and to submit to any reasonable search, including a search of any computer, based on a reasonable suspicion that petitioner possesses contraband or has violated a condition of release. *Id.* at 5-6, 24-26.

After announcing the sentence, including the special conditions, the district court asked for objections. Pet. App. 6. Petitioner's counsel raised "a generalized objection," saying he was "not really prepared to respond to all of the sexual-offender conditions." *Ibid.* The court recessed for lunch. *Ibid.* After the recess, which lasted more than an hour, petitioner's counsel stated that he had not "specifically examined the statutes" relating to the special conditions of supervised release, but he raised several grounds for an "objection" to the special conditions. *Ibid.*; 4/27/07 Tr. 80-81. He argued that

the special conditions were "unnecessary" because petitioner had not been convicted of a sex offense since 1994, that such conditions had not been imposed as part of his earlier federal sentence, and that many of the other allegations of illegal sexual activity were "false" and "unsubstantiated" and had ultimately not been prosecuted. Pet. App. 6-7. In response, the probation officer indicated that the special conditions were appropriate because petitioner had, at the least, "commit[ted] a lewd and lascivious act on a four-year-old child," and that sex-offender treatment would be "dynamic" and could be adjusted if at some point petitioner no longer needed it. *Ibid.* The court overruled petitioner's objection to the conditions of supervised release. *Ibid.*

3. The court of appeals affirmed petitioner's sentence. Pet. App. 1-17.

a. The court of appeals first addressed petitioner's contention that he was entitled to advance notice that he might be subject to special conditions of supervised release. Pet. App. 8-11. Petitioner relied on *Burns* v. *United States*, 501 U.S. 129 (1991), which invoked due process principles in interpreting Federal Rule of Criminal Procedure 32 to require defendants to receive notice of upward departures from the Sentencing Guidelines. The court of appeals instead followed this Court's more recent decision in *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), which distinguished *Burns* and held that defendants are not entitled to advance notice of potential variances from advisory Guidelines ranges. *Id.* at 2202; Pet. App. 10. The court of appeals noted the existence of "procedural protections," including the "rights to review and object to the presentence report," and concluded that a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of

supervised release." *Ibid.* The court held that "[t]he district court was not required to notify [petitioner] before it imposed special conditions to address his proclivity for sexual misconduct." *Id.* at 11. It also concluded that petitioner "did not allege, nor does the record suggest, that he was prejudiced by" the lack of advance notice. *Ibid.* The court explained that petitioner's underlying misconduct had been detailed in the PSR, and petitioner's counsel had specifically "addressed the allegations of sexual misconduct both before and at sentencing, and he did not move for a continuance to develop additional arguments or submit evidence to refuse those allegations." *Ibid.*

b. The court of appeals then considered whether the district court had imposed any special condition of supervised release that was unnecessarily restrictive in light of the purposes of sentencing and the relevant factors from 18 U.S.C. 3553(a). 18 U.S.C. 3583(c) and (d)(1)-(2); Pet. App. 11-12. Considering each condition of supervised release in light of petitioner's history and characteristics, the court concluded that the sentencing court had not abused its discretion. *Id.* at 12-17.

ARGUMENT

1. Petitioner principally contends (Pet. 9-28) that the district court was required to provide him with advance notice of potential conditions of supervised release. The court of appeals correctly rejected that contention in light of this Court's decision in *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), which held that a defendant is not entitled to notice of a potential variance from the sentencing range under the advisory Sentencing Guidelines. There is no conflict among post-*Irizarry* decisions in the courts of appeals. In addition, this case

would make a poor vehicle for addressing *Irizarry*'s applicability to conditions-of-release cases, because any error in petitioner's case was harmless. Accordingly, no further review by this Court is warranted.

a. Federal Rule of Criminal Procedure 32(i)(1)(C) provides that sentencing courts "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence." In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court held that a defendant is entitled to receive notice of a potential departure from the Sentencing Guidelines on the basis of similar language—then located at Rule 32(a)(1). See *id.* at 136. The *Burns* Court noted that a contrary reading of Rule 32 would raise a "serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138. More recently, however, the Court held in *Irizarry* v. *United States*, *supra*, that the decision in *Burns* should not be "extend[ed]" to require advance notice to a defendant of a potential variance from the Sentencing Guidelines, which had been rendered advisory by *United States* v. *Booker*, 543 U.S. 220 (2005).[2] See *Irizarry*, 128 S. Ct. at 2203. *Irizarry* relied on several considerations fully applicable to the question at issue in this case.

First, *Irizarry* emphasized that a defendant's desire to obtain notice of a potential variance is not an "expectation subject to due process protection." 128 S. Ct. at 2202. Before *Booker*, "a criminal defendant would re-

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[2] As *Irizarry* explained, a "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." 128 S. Ct. at 2202. A "variance," by contrast, is merely a deviation from the advisory Guidelines range in light of the statutory sentencing factors set out in 18 U.S.C. 3553(a). 128 S. Ct. at 2202-2203.

ceive a sentence within the presumptively applicable guideline range." *Ibid.* But that presumption no longer exists. "Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness." *Ibid.* Thus, "the justification for [this Court's] decision in *Burns* no longer exists." *Id.* at 2203. That reason applies fully to conditions of supervised release. There is no "presumption of unreasonableness" pertaining to special conditions of release. On the contrary, it is well established that sentencing courts have broad discretion when choosing such conditions. See 18 U.S.C. 3583(d) ("The court may order, as a further condition of supervised release * * * any other condition it considers to be appropriate."). Thus, as in *Irizarry*, there is not "the same degree of reliance * * * that gave rise to a special need for notice in *Burns*." 128 S. Ct. at 2202. While a condition of supervised release still must serve a subset of the factors set out at 18 U.S.C. 3553(a), see 18 U.S.C. 3583(d)(1) and (2), those are the same factors that constrain the imposition of a variance from the advisory Guidelines range, see *Booker*, 543 U.S. at 245-246, 259-260. Because those factors do not create an "expectation subject to due process protection" in connection with a variance, *Irizarry*, 128 S. Ct. at 2202, they must also fail to create such an expectation in connection with a condition of supervised release.

Second, *Irizarry* explained that normally "a competent lawyer . . . will anticipate most of what might occur at the sentencing hearing—based on the trial, the pre-sentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence." 128 S. Ct. at 2203 (quoting *United States* v. *Vega-Santiago*, 519 F.3d 1, 5 (1st Cir.) (en banc), cert. denied, 129 S. Ct. 92 (2008)). That reasoning fully ex-

tends to a condition of supervised release, which—as with a variance from the Guidelines range—is imposed "at the sentencing hearing." *Ibid.* (quoting *Vega-Santiago*, 519 F.3d at 5). Because "[m]ost probationers are * * * subject to individual 'special conditions' imposed by the court," *Gall* v. *United States*, 552 U.S. 38, 48 (2007), a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of supervised release," Pet. App. 10. "Garden variety considerations of culpability, criminal history, likelihood of reoffense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing." *Irizarry*, 128 S. Ct. at 2203 (quoting *Vega-Santiago*, 519 F.3d at 5). Accordingly, there is no general need for notice of a specific condition of release contemplated by the sentencing judge. Indeed, in this case, petitioner's lawyer knew that petitioner was a convicted sex offender —the PSR even mentioned his outstanding arrest warrant for failing to register as a sex offender—and he had specifically objected to some of the allegations of sexual misconduct identified in the PSR. Pet. App. 3-4.[3]

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[3] Petitioner objects that PSRs do not provide adequate notice to defendants because they do not "typically list potential special conditions of supervised release." Pet. 25. Yet PSRs also do not (and could not) list all potential variances. Cf. *Irizarry*, 128 S. Ct. at 2203 ("Sentencing is 'a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds.'") (quoting *Vega-Santiago*, 519 F.3d at 4). Nonetheless, *Irizarry* found that pre-sentencing notice is not categorically required to ensure that "all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id.* at 2203-2204. That conclusion forecloses petitioner's argument here. In any event, even apart from the specific procedural protections associated with the PSR, a defendant is also allowed at the sentencing "to

Third, *Irizarry* explained that the appropriate remedy for any surprise at sentencing is not to require advance notice but to "grant[] a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial." 128 S. Ct. at 2203. That continuance-based approach can be tailored to the relatively unusual cases in which "the factual basis for a particular sentence will come as a surprise to a defendant or the Government." *Ibid.* In contrast, petitioner proposes much broader requirement—a *per se* rule mandating notice in a vast range of sentencing cases. Because it would apply "even where the content of the * * * notice would not affect the parties' presentation of argument and evidence," petitioner's rule—like the proposed rule rejected in *Irizarry*—would accomplish nothing but "unnecessary delay." *Ibid.* As in *Irizarry*, a more narrowly drawn solution is "more appropriate" than the one petitioner proposes. *Ibid.*

b. Although petitioner claims that the decision in this case "conflicts with decisions" from four other circuits, Pet. 10-11, he concedes that all of the other decisions are "pre-*Irizarry*," Pet. 27. Because the other circuits may reconsider their prior positions in light of *Irizarry*, review by this Court at this time would be premature. While *Irizarry*'s applicability to potential conditions of supervised release is, as petitioner claims, an issue that is "likely to recur," *ibid.*, it appears to have arisen in only three cases (including this one) since June 2008. And the courts in the other two cases did not even need to resolve the question, though they both recog-

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comment on 'matters relating to an appropriate sentence'" and is "given an opportunity to speak and present mitigation testimony." *Id.* at 2204 n.2 (quoting Fed. R. Crim. P. 32(i)(1)(C) and citing Fed. R. Crim. P. 32(i)(4)(A)(ii)).

nized that *Irizarry* might require a departure from prior circuit precedent in an appropriate case. See *United States* v. *Weatherton*, 567 F.3d 149, 156 (5th Cir.), cert. denied, 130 S. Ct. 300 (2009); *United States* v. *Ybarra*, 289 Fed. Appx. 726, 733-734 (5th Cir. 2008). Thus, the volume of cases presenting the issue is not sufficient to create a kind of urgency that might otherwise warrant this Court's intervention when only one court of appeals has addressed how *Irizarry* should apply in this context.

c. In any event, this case would be a poor vehicle in which to consider the need for advance notice of potential conditions of supervised release, because any error by the district court in failing to provide such notice was harmless. See *Irizarry*, 128 S. Ct. at 2203 (finding lack of notice "harmless" because "the record does not indicate that a statement announcing [the possibility of a variance] would have changed the parties' presentations in any material way").

As the court of appeals below noted, petitioner "did not allege, nor does the record suggest, that he was prejudiced by the court's pronouncement." Pet. App. 11. Although petitioner's counsel expressed surprise at the conditions imposed on petitioner, the conduct by petitioner that prompted those conditions "was detailed in the presentence investigation report, and the record reflects that [petitioner] knew the district court likely would consider his criminal history in determining an appropriate sentence." *Ibid.* And petitioner's counsel did, after the benefit of a 77-minute recess, present reasons in support of his objections to the court's proposed conditions of supervised release. *Id.* at 6; 4/27/07 Tr. 80-81. Moreover, those reasons included the same kinds of considerations that petitioner raises now: that he had only one conviction for a sex offense; that the sex-

offense conviction was from 1994; that he had received sex-offender treatment at the time; that he had in the meantime been sentenced for other federal crimes without receiving any sex-offender-related conditions; that other allegations of sexual misconduct in the PSR were "unsubstantiated" and had not been prosecuted; and that the court could adequately protect the public through a less-restrictive means ("a mental evaluation and then treatment as necessary if * * * [petitioner] is some kind of a threat"). 4/27/07 Tr. 81-83; compare Pet. 33-34 (listing reasons he now contends that sex-offender special conditions are inappropriate in this case). Because the record does not establish that petitioner either encountered unfair surprise or was prejudiced by any lack of advance notice, further review of the notice question is not warranted.

2. Petitioner also contends (Pet. 28-34) that sex-offender conditions of supervised release were inconsistent with 18 U.S.C. 3583(d) and Sentencing Guidelines § 5D1.3, which require that discretionary conditions of supervised release must be "reasonably related to" a subset of the sentencing considerations set out in Section 3553(a), including "the history and characteristics of the defendant," "the need for the sentence imposed * * * to protect the public from further crimes of the defendant," and the need to supply the defendant with "correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(1) and (2). But the special conditions were consistent with the statute and Guidelines; there is no square conflict with other courts of appeals; and there is no need for further review of this factbound question.

a. The record supports special conditions of supervised release because of petitioner's "history," his poten-

tial threat to "the public," and his need for "treatment." 18 U.S.C. 3553(a)(1) and (2). Petitioner had previously pleaded no contest to the charge of committing a lewd and lascivious act on a child under the age of sixteen. Pet. App. 3. Petitioner's offense conduct entailed inserting his finger into a four-year-old girl's vagina. *Ibid.* Petitioner had also pleaded no contest to a separate charge of assault after being charged with sexual assault for beating and forcibly raping his victim. *Id.* at 3-4. Moreover, petitioner had failed to comply with state law requiring him to register as a sex offender, and he had violated earlier conditions of supervised release by changing his place of residence without notice and, soon after his release from prison, "was discovered in a household containing a minor female." *Id.* at 13.

Petitioner's special conditions of supervised release were responsive to those facts. For example, one condition ensures that petitioner will receive psychiatric treatment that may help him avoid further sex offenses, and another condition limits petitioner's ability to "communicate with potential victims" through the Internet. Pet. App. 12-14, 16. The special conditions imposed on petitioner were "reasonably related to" petitioner's "history," potential threat to "the public," and need for "treatment." 18 U.S.C. 3583(d), 3553(a)(1) and (2).

b. Petitioner argues (Pet. 29-34) that the decision below conflicts with decisions of the Sixth, Eighth, and Ninth Circuits that invalidated sex-offender conditions of supervised release. But the cases he cites are readily distinguishable. Indeed, petitioner himself characterizes those cases as "hold[ing] that a defendant's commission of a sex offense that is remote in time, *without more*, does not establish the requisite relationship between sex offender special conditions and the defen-

dant's history and characteristics or the statutory purposes of sentencing." Pet. 30 (emphasis added). As already noted, this case does involve "more" than a single, dated sex offense. Petitioner had convictions stemming from unlawful sexual activity with two different victims, including a four-year-old girl; he had violated earlier conditions of supervised release; he had violated state law by failing to register as a sex offender; and he was found residing in a household with a minor female. All of those factors prevent this case from presenting any square conflict with those he cites.[4] Additional review of petitioner's factbound question is accordingly unwarranted.

3. Petitioner finally contends (Pet. 34-38) that the condition of supervised release restricting his access to the Internet for three years without his probation offi-

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[4] See *United States* v. *Carter*, 463 F.3d 526, 532 (6th Cir. 2006) (vacating conditions of supervised released based exclusively on 17-year-old conduct and emphasizing that "[w]e need not and do not decide precisely how much time must elapse before a sex offense becomes too remote in time to be reasonably related to a sex-offender condition"); *United States* v. *T.M.*, 330 F.3d 1235, 1240-1241 (9th Cir. 2003) (vacating conditions of supervised release "predicated upon twenty-year-old incidents, without more"; noting that "more recent relevant events may revive old offenses and justify the imposition of supervised release conditions related to sex offender status"); *United States* v. *Scott*, 270 F.3d 632, 636 (8th Cir. 2001) (vacating conditions of supervised release based on 15-year-old conduct where sex-offender conditions had never before been imposed on defendant and where there was "no evidence" that defendant repeated or would repeat his past sexual misconduct); *United States* v. *Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) (reversing psychiatric-counseling condition imposed on a defendant convicted of mail fraud, because it was based on his abusive behavior toward his wife 13 years earlier, and the district court had conceded that defendant did not "present[] a threat to anyone except possibly" his wife, with whom he had reconciled).

cer's approval violated 18 U.S.C. 3583(d)(2), which provides that discretionary conditions of supervised release must involve "no greater deprivation of liberty than is reasonably necessary" to achieve a subset of the sentencing considerations set out in Section 3553(a).

Consistent with the statute's reasonable-necessity standard, sentencing courts are afforded broad discretion in imposing special conditions of supervised release; appellate courts review such conditions only for abuse of discretion. See, *e.g.*, *United States* v. *Taylor*, 338 F.3d 1280, 1283 (11th Cir.), cert. denied, 540 U.S. 1066 (2003); *United States* v. *Cothran*, 302 F.3d 279, 290 (5th Cir. 2002); *United States* v. *Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001); *United States* v. *Wilson*, 154 F.3d 658, 667 (7th Cir. 1998), cert. denied, 525 U.S. 1081 (1999). Given the applicable legal standards, petitioner's objection is erroneous and in any event not worthy of further review by this Court.

a. The sentencing court's decision to impose a limited restriction on petitioner's access to the Internet satisfied Section 3583(d)(2)'s deferential standard of reasonable necessity, which must be evaluated in light of the facts and circumstances of each case. The need for a restriction arose from petitioner's past sexual misconduct, including against a four-year-old girl; from petitioner's failure to comply with sex-offender-registration requirements; and from the police's discovery of petitioner living in a home occupied by a minor female in violation of his earlier conditions of supervised release. As the court of appeals noted, unlimited access to the Internet would facilitate petitioner's access to child pornography and his ability to "communicate with potential victims." Pet. App. 16. Thus, the district court did not abuse its discretion in concluding that some constraint

on petitioner's ability to access the Internet was reasonably necessary for petitioner's rehabilitation, as well as for the protection of the public.

Unlike the conditions invalidated in some other cases, the special condition imposed by the sentencing court here is not a total ban on access to the Internet. The restriction is instead limited in two important respects. First, petitioner is permitted to use the Internet if he obtains his probation officer's permission. Pet. App. 16. That not only provides petitioner with the ability to use the Internet, but also enhances the probation officer's ability to supervise and support petitioner's rehabilitation (*e.g.*, by making approved usage subject to periodic inspections of petitioner's computer). In that regard, the restriction here is materially similar to special conditions that were upheld even by some of the courts of appeals that petitioner contends are on the other side of the circuit split he alleges. See, *e.g.*, *United States* v. *Stults*, 575 F.3d 834, 856 (8th Cir. 2009) (upholding a "special condition barring Internet access unless approved by the probation office"), cert. denied, No. 09-8153 (Jan. 25, 2010); *United States* v. *Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009) (upholding ten-year restriction on Internet usage in part because defendant "may seek permission from the Probation Office to use the [I]nternet"), cert. denied, No. 09-7854 (Jan. 11, 2010); *United States* v. *Ristine*, 335 F.3d 692, 696 (8th Cir. 2003) (upholding prohibition on Internet usage at home in part because "the defendant was not completely prohibited from using a computer" and "could possess a computer with the permission of the probation officer"); *United States* v. *Crandon*, 173 F.3d 122, 128 (3d Cir.) (upholding limit on Internet usage without probation officer's approval), cert. denied, 528 U.S. 855 (1999).

Indeed, other courts have also upheld similar restrictions as an appropriate balance between licit and illicit uses of the Internet. See, *e.g.*, *United States* v. *Zinn*, 321 F.3d 1084, 1092 (11th Cir.), cert. denied, 540 U.S. 839 (2003); *United States* v. *Walser*, 275 F.3d 981, 988 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002); cf. *United States* v. *Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding, in light of defendant's circumstances, a condition of supervised release prohibiting Internet access even though it "contains no proviso permitting [defendant] to use these resources with the approval of his probation office"), cert. denied, 535 U.S. 1002 (2002).

Second, the special condition here is also limited because it lasts for a period of three years—which is a shorter period than many of the restrictions that have been invalidated. See, *e.g.*, *United States* v. *Heckman*, No. 08-3844, 2010 WL 59185, at *3-*6 (3d Cir. Jan. 11, 2010) (invalidating lifetime limit on Internet usage); *United States* v. *Voelker*, 489 F.3d 139, 144 (3d Cir. 2007) (same); *United States* v. *Freeman*, 316 F.3d 386, 391-392 (3d Cir. 2003) (invalidating five-year limit on possessing any computer in defendant's home or using any on-line computer service); *United States* v. *Peterson*, 248 F.3d 79, 81, 83-84 (2d Cir. 2001) (invalidating five-year limit on Internet usage). Indeed, the Third Circuit has explained that one of "two key factors" it considers when evaluating the reasonableness of a special condition limiting Internet access is "the scope of the supervised release condition, including both its duration and its substantive breadth." *United States* v. *Miller*, No. 08-4278, 2010 WL 395917, at *13 (Feb. 5, 2010); see also *Crandon*, 173 F.3d at 128 (upholding three-year limit on Internet usage).

Moreover, petitioner has not identified any personal circumstances that might make a limitation on Internet usage unduly restrictive in his case, which also distinguishes it from some of the cases in which restrictions have been invalidated. See, *e.g.*, *United States* v. *Holm*, 326 F.3d 872, 878 (7th Cir.) (explaining that a special condition restricting Internet usage would jeopardize the defendant's rehabilitation because he had an "almost 30-year history of working in computerized telecommunications" and was "most likely to find gainful employment in the computer field"), cert. denied, 540 U.S. 894 (2003); *Peterson*, 248 F.3d at 83-84 (concluding that a special condition restricting computer and Internet use "constituted an occupational restriction" because the defendant had "consistently worked in computer-related jobs and * * * operated his own computer business").

Finally, even apart from being able to secure approval from his probation officer, petitioner may ask the district court to modify the special condition if there is any evidence of his rehabilitation or a material change in his circumstances. See 18 U.S.C. 3583(e)(2); see, *e.g.*, *United States* v. *Fields*, 324 F.3d 1025, 1027 (8th Cir. 2003) (upholding prohibition on Internet access; noting that defendant may "raise any concrete concerns [about access to educational or vocational training] with his probation officer and the district court if and when they arise").

b. Petitioner contends (Pet. 34-35) that further review is warranted in this case to resolve disagreement among the courts of appeals. The courts of appeals have expressed differing views, in light of the particular records before them, about when conditions of supervised release involving Internet access are reasonably necessary. See, *e.g.*, *United States* v. *Crume*, 422 F.3d 728,

733-734 (8th Cir. 2005) (vacating as overbroad an Internet-usage condition similar to petitioner's where defendant had a criminal history of committing sexual abuse against children and failing to register as a sex offender, but had not "used his computer for anything beyond simply possessing child pornography"); *United States* v. *Sofsky*, 287 F.3d 122, 126-127 (2d Cir. 2002) (vacating limitation similar to petitioner's where defendant had committed larceny and incest but not, for example, sexual assault against children); *Freeman*, 316 F.3d at 392 (vacating as overbroad an Internet-usage condition similar to petitioner's, albeit of longer duration, where defendant had been convicted of possessing child pornography and had admitted committing sexual abuse against children, but the record did not show that defendant had "used the [I]nternet to contact young children"); *Peterson*, 248 F.3d at 83-84 (vacating restriction on computer and Internet usage where defendant's prior incest conduct had no connection to computers and where the restriction would constitute "an occupational restriction"); see also *United States* v. *Silvious*, 512 F.3d 364, 371 (7th Cir. 2008) ("[A] total ban on the use of computers with access to the Internet is in most cases an overbroad condition of supervised release. We have not ruled out the possibility that such a condition might be justified in some cases, but nothing in the record suggests this is one of them.") (citations omitted); *United States* v. *Scott*, 316 F.3d 733, 736 (7th Cir. 2003) (stating as a general rule that conditions of supervised release "should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post*").

Yet, as the foregoing discussion demonstrates, appellate decisions reviewing conditions of supervised release

are highly fact-dependent and address a wide array of unique circumstances—including each defendant's offense conduct, criminal history, and the details of individual conditions of supervised release. See pp. 15-17, *supra*; see also, *e.g.*, *Stults*, 575 F.3d at 856 ("Although it is a close call, we think that this case is more like *Ristine* [in which a limit on Internet usage was sustained] than *Crume* [in which one was invalidated] and hold that the special condition barring Internet access unless approved by the probation office is sufficiently tailored to the particular facts of this case."). Thus, notwithstanding alleged conflicts among the courts of appeals, this Court has repeatedly denied review of cases that sustained conditions of supervised release related to computers and the Internet. See, *e.g.*, *Bell* v. *United States*, 129 S. Ct. 2735 (2009) (No. 08-8179); *Rearden* v. *United States*, 543 U.S. 822 (2004) (No. 03-9465); *Knight* v. *United States*, 542 U.S. 939 (2004) (No. 03-9006); *Walser* v. *United States*, 535 U.S. 1069 (2002) (No. 01-9501); *Paul* v. *United States*, 535 U.S. 1002 (2002) (No. 01-8691); *Crandon* v. *United States*, 528 U.S. 855 (1999) (No. 98-9838).

This Court should likewise decline to undertake such a fact-intensive review here. Even when read as broadly as petitioner suggests, the opinion below, which did not specifically address the relevance of some of the particular considerations identified by other courts of appeals, would stand only for a very narrow proposition—namely, that conditioning a defendant's use of the Internet on prior probation officer approval is not an abuse of discretion when a defendant has previously been convicted of sexual crimes, including against a young child; has failed to register as a sex offender in violation of state law; and has recently violated his terms of supervised

release in order to arrive in circumstances where he might readily victimize another minor. That narrow legal principle does not warrant this Court's review.

This Court's practice of denying review in such cases is especially appropriate in light of the rapidly changing nature of the relevant technology. The availability of less-intrusive alternatives is an important consideration in evaluating the reasonable necessity of a condition of supervised release. See, *e.g.*, *Freeman*, 316 F.3d at 392 ("There is no need to cut off [defendant's] access to email or benign [I]nternet usage when a more focused restriction * * * can be enforced by unannounced inspections."); *Sofsky*, 287 F.3d at 127 (preferring "a more focused restriction"). Thus far, the case law in this area rests in part on judicial evaluations of whether more-narrowly-drawn restrictions on computer or Internet usage would allow probation officers to monitor defendants with roughly equivalent effectiveness. The best available answers to that question may well change or become more clear with time. For example, computer monitoring technologies may render relatively broad restrictions entirely superfluous. See, *e.g.*, *Holm*, 326 F.3d at 879 (invalidating a total ban on Internet usage, but noting that the district court "may wish to consider imposing a requirement that any computer [the defendant] is permitted to use must be" equipped with "filtering software," which "is becoming ever more effective"). Alternatively, software that conceals a computer user's activities may become available and prevent narrower restrictions from being reliably enforced. In a context where decisions about the reasonableness of a restriction on Internet usage are based on multiple, case-specific factors, that dynamic landscape would likely pre-

vent this Court from articulating a lasting, general rule to govern future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

VIRGIL MORAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

I. The Eleventh Circuit's decision that notice is not required prior to the imposition of special conditions of supervised release creates a circuit conflict on an important matter and will deprive defendants of an opportunity to comment on a matter relating to an appropriate sentence.

Certiorari should be granted because this case presents an important issue that is likely to recur: whether notice must be afforded a defendant before the district court imposes special conditions of supervised release the defendant would not reasonably have expected. The Fifth, Seventh, Ninth, and Tenth Circuits have held that notice is required under such circumstances pursuant to Federal Rule of Criminal Procedure 32(i)(1)(C)'s requirement that defendants be afforded an opportunity to comment on "matters relating to an appropriate sentence" and this Court's holding in *Burns v. United States*, 501 U.S. 129, 135-36 (1991), that implicit in "the right to *comment* on" a matter related to sentencing is "the right *to be notified* that the court is contemplating such a ruling." *See* Pet. at 11-12, 14-17. In its opinion in this case, the Eleventh Circuit broke with every other circuit court of appeal that has considered this issue, holding that the Court's ruling in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), that notice is not required prior to the imposition of a variance from the Sentencing Guidelines, *id.* at 2201-02, should be

extended to special conditions of supervised release. App. 10-11. The government argues in opposition to Moran's Petition that: (a) granting review would be premature because the opinions the Eleventh Circuit's decision conflicts with predate *Irizarry*, (b) the Eleventh Circuit's opinion was correct, and (c) this case would be an inappropriate vehicle to address the notice issue.

A. The conflict in the circuits persists post-*Irizarry*.

Moran discussed in the Petition the conflict between the Eleventh Circuit's decision and decisions of the Fifth, Seventh, Ninth, and Tenth Circuits. *See* Pet. at 14-17. Prior to this Court's decision in *Irizarry*, each of those circuits had held that notice is required before the imposition of a special condition that is not among the mandatory or discretionary statutory conditions of supervised release identified in 18 U.S.C. Section 3563 or United States Sentencing Guideline Section 5D1.3, is unusual, or is unrelated to the offense of conviction. *See* Pet. at 14-17.

The government does not dispute that the Eleventh Circuit's decision conflicts with the decisions Moran discussed. It asserts, however, that it would be premature for the Court to review the Eleventh Circuit's decision because "the other circuits may reconsider their prior positions in light of *Irizarry*." Opp'n at 9-10. To the contrary, in two recent Ninth Circuit opinions, the courts have cited the Ninth

Circuit's pre-*Irizarry* holding in *United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004), that "[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed." *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009) (quoting *Wise*, 391 F.3d at 1033); *see also United States v. Camp*, 344 Fed. Appx. 431, 433 (9th Cir. 2009) (citing *Wise*, 391 F.3d at 1033). In neither of these recent opinions did the Ninth Circuit question the rule set forth in *Wise* or indicate any intention to overrule *Wise* based on *Irizarry*.

The government further argues that the conflict regarding the notice issue does not require the Court's attention because the issue has arisen in only a few cases post-*Irizarry*. The issue arose repeatedly pre-*Irizarry*, *see* Pet. at 14-17, 27-28, and has arisen at least five times in the circuit courts of appeal in the fewer than two years since *Irizarry* was decided – in this case, the two Fifth Circuit cases discussed in Moran's Petition in which the courts commented that the law regarding notice has become unclear, Pet. 27, and the two Ninth Circuit cases discussed above. Accordingly, the conflict regarding whether notice is required prior to the imposition of special conditions of supervised release persists and is ripe for the Court's attention.

B. The Eleventh Circuit's decision is incorrect.

Moran also argued in his Petition that the Eleventh Circuit's holding is an unwarranted extension of *Irizarry* and is inconsistent with the Court's holding in *Burns* and Rule 32(i)(1)(C)'s requirement that district courts allow the parties to comment on "matters relating to an appropriate sentence." Pet. at 18-27. As Moran explained, the Eleventh Circuit relied on the first of the three reasons *Irizarry* identified for holding that notice is not required prior to a variance – that defendants have no expectation subject to due process protection of a within-Guidelines sentence post-*Booker*. Pet. at 11, 19. The second and third reasons stated in *Irizarry*, however, do not hold up regarding unanticipated special conditions of supervised release. Pet. at 19-27. That is, unlike what the Court found to be true regarding variances from the Sentencing Guidelines, *Irizarry*, 128 S. Ct. at 2203-04, notice of unexpected special conditions is necessary to ensure that the parties have an adequate opportunity to address the relevant factual and legal issues, *see* Pet. 20-23, and the remaining procedural protections afforded defendants do not adequately protect the ability to comment on the contemplated conditions of supervised release, *see* Pet. 24-27.

In its Opposition, the government, like the Eleventh Circuit, relies on the first *Irizarry* factor, arguing that the discretion district courts have in imposing special conditions precludes defendants

from having any expectation subject to due process protection in connection with them. Opp'n at 6-7. As discussed in Moran's Petition, however, the question is not only whether defendants anticipate that some special conditions might be imposed, but whether they have adequate notice regarding the nature of the specific special conditions contemplated by the district court to be able to meaningfully comment on them. In this regard, there is a critical difference between the imposition of a variance and the imposition of a special condition: the decision to vary results in movement along a single axis – the number of months a defendant will be incarcerated – while there is almost no limit to the variety of special conditions a district court may impose. *See* Pet. 20-21 & n.1. *Irizarry*'s holding that parties can be expected to address at sentencing all issues that relate to the length of a defendant's sentence does not imply that parties should reasonably be expected to anticipate and respond to any special condition, no matter how unexpected.

The government claims that in most cases, attorneys will anticipate that special conditions will be imposed and be aware of the nature of those conditions based on the presentence report and the proceedings leading up to sentencing. Opp'n at 7-8. That is no doubt true in most cases. Moran does not propose, and no court has established, a rule that notice must be provided prior to the imposition of *any* special condition of supervised release. Instead, the Fifth, Seventh, Ninth, and Tenth Circuits have held

notice is required when a defendant would not reasonably be expected to anticipate a contemplated special condition, such as where it is not among the mandatory and discretionary conditions of supervised release and there is no nexus between the condition and the offense of conviction. *See* Pet. at 14-17. Under those circumstances, notice is necessary if the parties are to adequately address the factual and legal issues relating to such a condition.

Finally, the government argues that defendants' rights may be adequately protected by a continuance in those cases in which lack of notice has prejudiced the defendant, rather than a notice requirement. Opp'n at 9. The government's contention overlooks the reality of how sentencing proceedings are ordinarily conducted. In most cases, including this one, there is no indication prior to the pronouncement of sentence of what special conditions of supervised release might be imposed. As discussed in Moran's Petition, Pet. at 26-27, where the defendant has no reason to expect the special conditions imposed, "first to impose the sentence, and then to invite counsel to comment. . . . is no notice at all." *Wise*, 391 F.3d at 1033. The government makes no response to this point.

C. This case is an appropriate vehicle to resolve the conflict.

The government argues that this case would be a poor vehicle to address the conflict regarding the

notice issue on the theory the error was harmless. Opp'n at 10-11. According to the government, Moran's counsel should have anticipated the special conditions that were imposed and Moran was not prejudiced by lack of notice because he presented the same arguments in response to the conditions that were presented on appeal. *Id.* Neither contention holds up.

With regard to whether Moran's counsel should have anticipated the extensive sex offender special conditions that were imposed here, it bears noting that the conditions were unrelated to the offense of conviction and were imposed based on a single alleged sex offense that was remote in time, and for which sex offender treatment had already been imposed. *See* Pet. at 4. None of the five times Moran had been sentenced in the intervening thirteen years had resulted in the imposition of sex offender conditions. *Id.* at 5. Moreover, there was literally no connection between at least one of the conditions – the internet prohibition – and any alleged wrongdoing.

Further, the inability of Moran's counsel to adequately argue in opposition to the sex offender special conditions is precisely the prejudice Moran suffered. While Moran's counsel made some of the same factual arguments Moran raises on appeal, counsel represented that he had not researched the issue. App. 6, and his argument in opposition to the special conditions was without any supporting authority. As discussed in the Petition, the imposition of sex offender conditions based on a single thirteen-year-old

conviction was inconsistent with opinions of other circuits holding that a remote-in-time sex offense does not establish the necessary relationship between sex offender special conditions and the statutory sentencing factors. *See* Pet. at 29-34. Further, the internet prohibition was inconsistent with decisions from other circuits because there was no nexus between the condition and any wrongdoing by Moran and the condition was overbroad. Not surprisingly, Moran's counsel did not cite any of this authority or effectively make the arguments these decisions would have supported because he had no notice that sex offender special conditions were under consideration.

II. The Eleventh Circuit's holding that special conditions based on a single thirteen-year-old sex offense were reasonably related to the statutory sentencing factors conflicts with other circuits' decisions.

As discussed in Moran's Petition, the Eleventh Circuit's opinion also conflicted with opinions from the Sixth, Eighth, and Ninth Circuits interpreting the requirement of a reasonable relationship between special conditions and the statutory sentencing factors set forth in 18 U.S.C. Section 3553(a) and U.S.S.G. Section 5D1.3. The Eleventh Circuit's affirmance of sex offender special conditions based on a single thirteen-year-old sex offense conflicted with opinions of each of those courts holding that a single remote-in-time sex offense conviction does not

establish the necessary reasonable connection to the statutory sentencing factors. Pet. at 29-34.

The government does not take issue with the rule stated in the Sixth, Eighth, and Ninth Circuit cases Moran discussed in his Petition. Instead, it argues only that the Eleventh Circuit's opinion is distinguishable from the opinions Moran cites, based on other misconduct Moran has allegedly engaged in. Opp'n at 12-13. Moran discussed in his Petition the allegations the government relies on, and pointed out that they involve an unsubstantiated charge that did not result in a sex offense conviction and allegations that, if proven, do not constitute sex offenses. Pet. at 30-31 n.3. In several of the cases Moran cited for the proposition that a sex offense in the distant past is an insufficient basis for the imposition of sex offender special conditions, the defendants, like Moran, had in the interim engaged in other wrongdoing that were not sex offenses. *See United States v. Carter*, 463 F.3d 526, 532-33 (6th Cir. 2006); *United States v. T.M.*, 330 F.3d 1235, 1238 (9th Cir. 2003); *United States v. Scott*, 270 F.3d 632, 633 (8th Cir. 2001). These cases recognize that more recent wrongdoing will not "revive old offenses and justify the imposition of supervised release conditions related to sex offender status" where "the intervening actions . . . bear no significant relation to sex offender status." *T.M.*, 330 F.3d at 1240-41; *see also Carter*, 463 F.3d at 532-33. In sum, the Eleventh Circuit's opinion in this case directly conflicts with opinions of the Sixth, Eighth, and Ninth Circuits and is not distinguishable.

III. The Eleventh Circuit's holding that an internet prohibition is not a greater deprivation of liberty than necessary to achieve the statutory purposes of sentencing where there was no nexus between computers or the internet and wrongdoing by the defendant conflicts with other circuits' decisions.

The Eleventh Circuit's affirmance of a special condition prohibiting Moran from internet access without prior permission from his probation officer also conflicted with opinions of other circuits regarding the requirement that conditions of supervised release involve no greater deprivation of liberty than necessary to accomplish the statutory purposes of sentencing. Moran explained in his Petition that the Eleventh Circuit's opinion was inconsistent with the Second Circuit's holding in *United States v. Peterson*, 248 F.3d 79, 82-84 (2d Cir. 2001), that an internet prohibition is overbroad where, as here, there is no nexus between any wrongdoing by the defendant and computers or the internet. *See* Pet. at 35-36. In the months since Moran filed his Petition, two additional courts of appeal, the Third and Fourth Circuits, have required a connection between internet special conditions and the defendant's wrongdoing. *See United States v. Miller*, 594 F.3d 172 (3d Cir. 2010); *United States v. Smathers*, 2009 WL 3792421 (4th Cir. 2009) (unpublished). *Miller* was a child pornography case in which the district court prohibited internet access without the prior permission of the probation officer. 594 F.3d at 184-85. The Third Circuit stated that

among the "key factors" courts must consider in evaluating the reasonableness of an internet restriction is "the severity of the defendant's criminal conduct and the facts underlying the conviction, with a particular focus on whether the defendant used a computer or the internet to solicit or otherwise personally endanger children." *Id.* at 187. Accordingly, *Miller* reversed the internet prohibition and remanded for the district court's consideration of the restriction's "relationship to the facts underlying [the defendant's] conviction, particularly his use of the internet." *Id.* at 188. In *Smathers*, the Fourth Circuit held it was plain error to impose a condition forbidding internet access without prior permission of the probation officer on a defendant convicted of the sexual exploitation of minors. *Id.* at *1. The court stated that because the defendant's "crime did not involve a computer or the Internet" and there was no "evidence that [the defendant] has a history of using the computer or Internet to obtain or disseminate child pornography," the condition was "not reasonably related to the § 3553(a) factors . . . nor is it in line with the Sentencing Commission's policy statement recommending '[a] condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items' in committing a sex offense." *Smathers*, 2009 WL 3792421, at *1 (quoting § 5D1.3(d)(7)).

Moran further explained that the Eleventh Circuit's affirmance of this condition also conflicted with decisions of the Second, Third, Seventh, and Eighth

Circuits holding the precise condition imposed here – a prohibition against access to the internet without prior permission from the probation officer – to be overbroad even where there is some connection between the defendant's offense and the internet. *See* Pet. at 36-37. In response, the government cites cases upholding internet restrictions. Opp'n at 15-16. Each of the government's cases involved a direct connection between the defendant's offense and the internet. *United States v. Stults*, 575 F.3d 834, 855 (8th Cir. 2009) (internet used to commit child pornography offense); *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003) (internet used to attempt "to arrange sexual relations with underage girls"); *United States v. Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009) (defendant "utilized internet communication technologies to facilitate, entice, and encourage the real-time molestation of a child"); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (internet used to solicit minor).

The government also points out that, unlike the internet restrictions at issue in some cases, the condition here is limited in time and subject to the possibility of approval by the probation officer or modification by the district court, and does not affect Moran's livelihood. Opp'n at 16-17. That more restrictive internet restrictions are possible does not justify the imposition of an internet restriction in this case, in which the condition is unrelated to the defendant's conduct.

The government acknowledges that "[t]he courts of appeals have expressed differing views" regarding the circumstances under which special conditions restricting internet access are permissible, Opp'n at 17, but argues that review of conditions of supervised release is "highly fact-dependant" and therefore not an appropriate area for the Court's review. Opp'n at 18-19. The review necessary to determine that there has never been even an allegation Moran used the internet to engage in any form of wrongdoing is hardly "fact-intensive." Nor is the rule requiring a relationship between an internet restriction and the defendant's criminal history unduly complicated, and indeed is contemplated by the Sentencing Commission's policy statements. *See Smathers*, 2009 WL 3792421, at *1.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Petition should be granted.

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